Supreme Court, U.S.
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No.

In the Supreme Court of the United States

TOWNSHIP OF LIBERTY, OHIO, et al.,
Petitioners,

v.

WEDGEWOOD LIMITED PARTNERSHIP I,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE E. BARBIERE
OHIO SUPREME CT. #0027106
Counsel of Record
SCHROEDER, MAUNDRELL,
BARBIERE & POWERS
5300 SOCIALVILLE FOSTER ROAD
SUITE 200
MASON, OH 45040
(513) 583-4200
(513) 583-4203 (fax)
lbarbiere@smbplaw.com

November 10, 2010 *Attorney for Petitioners*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in direct conflict with decisions of this Court and other circuits discouraging the use of the federal court as a zoning board of appeals, the Sixth Circuit may create a federal law of zoning, which finds a deprivation of procedural due process in the refusal to grant a zoning application absent a state-created property right in the zoning application and absent any limitation on the discretion of the issuing authority?

2. Whether the Sixth Circuit can interpret the abstention doctrine in a manner to avoid reviewing the lower court's decision denying abstention solely to effectuate its federal law of zoning?

PARTIES TO THE PROCEEDINGS

Petitioners: The Petitioners are Township of Liberty, Ohio, located in Delaware County, Ohio, the Board of Trustees of Liberty Township, the individual Board members in their capacity as Trustees, and Holly C. Foust, Liberty Township Zoning Inspector. Petitioners were the defendants in the district court and the defendants-appellants in the court of appeals.

Respondent: The Respondent is Wedgewood Limited Partnership I. Respondent was the plaintiff in the district court and the plaintiff-appellee in the court of appeals.

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OPINIONS AND ORDERS ENTERED BELOW

Petitioners respectfully request a *writ of certiorari* issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this case. The Sixth Circuit, in conflict with this Court and other circuits, permitted a procedural due process claim premised on the denial of a zoning application in spite of the absence of a state-created property right entitled to constitutional protection.

Federal Court Opinions and Orders:

The Sixth Circuit Court of Appeals' Opinion was issued June 28, 2010, and is reported at 610 F.3d 340 (6th Cir. 2010) (Appendix A at 1a).

The Opinion and Order of the district court, per Judge Algenon L. Marbley, granting in part and denying in part the cross-motions for summary judgment of Petitioners and Respondent, was rendered on September 26, 2008, and is reported at 578 F. Supp. 2d 941 (S.D. Ohio 2008) (Appendix B at 38a).

The Opinion and Order of the district court, per Judge Algenon L. Marbley, granting in part and denying in part Petitioners' motion to dismiss, was rendered on October 12, 2006, and is reported at 456 F. Supp. 2d 904 (S.D. Ohio, 2006) (Appendix C at 64a).

An order denying rehearing *en banc* was issued August 29, 2010 (Appendix D at 135a).

STATEMENT OF THE BASIS FOR JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on June 28, 2010, and denied a timely-filed petition for rehearing *en banc* on August 29, 2010. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES

This case involves the following constitutional provisions, statutes, and municipal ordinances, which are reproduced at Appendix E:

The Due Process Clause of the Fourteenth Amendment.

42 U.S.C. §1983.

Liberty Township Zoning Resolution §25.03 (2002).

STATEMENT OF THE CASE AND FACTS

This is a procedural due process case arising out of Petitioners' decision to deny zoning approval for Respondent's plan to develop a Wal-Mart Supercenter within Wedgewood Commerce Center ("WCC"), a Planned Unit Development ("PUD"), in Liberty Township approved by the Board of Trustees of Liberty Township in November of 1991. (Appendix B at 40a.) Seventeen subareas were created with three different types of designated use: commercial, residential, and office. Only subareas 3, 8, and 9 were zoned for commercial use. (Appendix B at 41a.) Respondent

owned an approximately 34-acre lot located in the WCC identified as subarea 3, which was allotted a maximum of 220,857 square feet of commercial building space. Over the next thirteen years, in accordance with standard Liberty Township zoning procedure, significant development occurred within the WCC. Parts of subareas not originally designated for commercial development were used for commercial development pursuant to permits for these zoning changes approved by Liberty Township. (Appendix C at 72a.)

Following the October 2003 denial of Respondent's application for variances, primarily from setbacks, to build a Wal-Mart Supercenter on subarea 3, the public expressed concern over the extent of commercial development, and Respondent formally withdrew the variance application. The Board of Trustees then ordered the Zoning Inspector to study the matter. (Appendix C at 72a-73a.) On January 19, 2004, the Zoning Inspector issued a Public Statement regarding the PUD Plan, (the "January 19 Instructions"), finding it imposed a "floating cap"or overall maximum of 500,000 square feet for commercial development within the WCC. (Appendix F at 139a.) On June 29, 2004, Respondent submitted an application for a zoning permit to build a 220,598 square foot Wal-Mart Supercenter and Murphy Oil Gas Station in subarea 3. (Appendix C at 75a-76a.) On September 30, 2004, the Zoning Inspector denied the application based both on its failure to comply with the overall commercial square footage maximum, as well as on its failure to comply with zoning requirements unrelated to the

January 19 Instructions.[1] (Appendices C at 76a; G at 147a.)

On October 20, 2004, Respondent initiated state court proceedings by appealing the Zoning Inspector's denial to the Liberty Township Board of Zoning Appeals ("BZA") for a number of reasons including its claim the January 19 Instructions were inaccurate. (Appendix C at 77a.) On November 5, 2004, in spite of its pending appeal to the BZA, Respondent filed this action in federal court. Respondent sought, among other relief, the following: 1) a declaration the enforcement of the overall limit or "floating cap" described in the January 19 Instructions violated Respondent's right to procedural due process; 2) an order enjoining Petitioners from enforcing the "floating cap"; and 3) an order requiring Petitioners to issue the sought after zoning certificate. (Appendix C at 79a, 82a-83a.)

Both Respondent's state and federal proceedings center on the issue of the overall limit on commercial development in the WCC to 500,000 square feet and whether it was part of the original PUD Plan approved in 1991 or was an amendment to the PUD Plan created by the January 19 Instructions. If the overall limit was part of the original PUD Plan, as Petitioners have urged in both proceedings, Respondent's zoning application was properly denied because the square footage sought for development of the Wal-Mart Supercenter would have caused the amount of

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[1] The district court agreed the zoning application was properly denied based upon these other failures unrelated to the January 19 Instructions. (Appendix C at 118a.)

commercial development to exceed this limit and no due process analysis was necessary. If the overall limit was an amendment to the PUD Plan, as Respondent has argued, a due process analysis was necessary to determine whether Petitioners followed state procedural requirements for zoning amendments and whether a failure to follow procedural requirements was a deprivation of due process.

State and federal proceedings reached the exact opposite conclusion on this issue. The BZA, the body designated by state law to make the factual determination in the state proceedings, determined the overall limitation was included in the original PUD Plan. Contrarily, the district court and the Sixth Circuit determined the January 19 Instructions amended the original PUD Plan to include the overall limitation. (Appendix A at 27a.)

The BZA upheld the Zoning Inspector's denial of the Zoning Application ("BZA1"). (Appendix C at 79a.) The state trial court, on appeal of BZA1, remanded the matter to the BZA to conduct evidentiary hearings. (Appendices C at 82a; H at 156a.) Between September 11, 2007 and June 24, 2008, the BZA conducted ten public evidentiary hearings pursuant to the remand order. (Appendix J at 189a-190a.)

The district court was aware of the remand to the BZA to hold evidentiary hearings, which had already begun. (Appendix B at 49a.) The hearings included testimony of those present at the time the PUD Plan was approved, including Respondent's principal. (Appendix J at 190a-191a.) Nonetheless, on October 12, 2006, the district court issued its Opinion and Order granting in part and denying in part the

motions to dismiss of Petitioners and Intervenor and rejecting Petitioners' request that the district court abstain in light of the pending state proceedings. (Appendix C at 64a.) Absent any evidentiary hearing, the district court interpreted the January 19 Instructions to be an amendment to the PUD Plan and proceeded with a due process analysis. (Appendix C at 126a-127a.) The district court dismissed Respondent's substantive and procedural due process claims after concluding, under Ohio law, Respondent had no vested property interest in the pre-January 19 Instructions zoning regulations as Respondent had no zoning application pending at the time the January 19 Instructions were issued. (Appendix C at 102a-103a.) Further, Respondent was not entitled to the applied for zoning certificate in light of the broad discretion of the issuing authority to approve or deny such applications under Liberty Township's Zoning Resolution §25.03. (Appendix C at 117a.) The district court allowed Respondent's claims for procedural due process based upon deprivation of a liberty interest and vagueness. (Appendix C at 128a and 130a.)

On September 25, 2008, following completion of the BZA evidentiary hearings and prior to the issuance of the BZA's findings and conclusions, the district court issued its Opinion and Order on the parties cross-motions for summary judgment. (Appendix B at 38a.) The district court reiterated its previous conclusion the January 19 Instructions amended the PUD Plan in which it concluded Respondent had a liberty interest. (Appendix B at 55a and 57a.) The district court then relied on *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), to find Respondent had been constitutionally entitled to notice and hearing prior to the amendment and the failure to

provide these procedures deprived Respondent of its right to procedural due process. (Appendix B at 57a.) The district court also granted Respondent summary judgment finding the PUD Plan unconstitutionally vague as applied. (Appendix B at 60a.) The district court, therefore, enjoined enforcement of the January 19 Instructions and application of the "floating cap." However, the district court denied Respondent's request for declaratory judgment, refusing to order Petitioners to issue Respondent the zoning permit. The district court cited its prior holding finding the Zoning Inspector's denial of the permit was not unwarranted based upon Respondent's failure to comply with elements of Petitioners' zoning regulations in effect prior to the January 19 Instructions. (Appendix B at 62a.)

Less than one month after the district court's summary judgment decision, the BZA issued its Findings of Fact and Conclusions of Law ("BZA2") affirming the denial of Respondent's zoning application. (Appendix J at 181a.) The BZA concluded the PUD Plan had from the outset included an overall 500,000 square foot maximum for commercial development within the WCC. (Appendix J at 202a-203a.) The BZA further concluded the January 19 Instructions were not pertinent to Respondent's zoning application and that Respondent's zoning application was justifiably denied for nine reasons unrelated to that 500,000 square foot overall limitation or "floating cap". (Appendix J at 210a.)

Respondent pursued an administrative appeal of BZA2 to the state trial court. The state trial court found the appeal moot and dismissed for lack of subject matter jurisdiction. (Appendix K at 215a.) The

state appellate court affirmed the dismissal. (Appendix L at 225a.) The Supreme Court of Ohio denied jurisdiction to consider the matter. (Appendix M at 238a.)

On June 28, 2010, in a split decision, the Sixth Circuit panel affirmed the district court's grant of a permanent injunction holding Petitioners deprived Respondent of its procedural due process rights. However, in contrast to the district court and the dissent, the majority found a deprivation of Respondent's protected property interest on which to base its holding. The majority rejected the district court's basis for finding a violation of procedural due process, which was the deprivation of a liberty interest. (Appendix A at 21a.) The majority did so in spite of its recognition of the absence of any state-created vested property interest in the zoning application or in the pre-January 19 Instructions zoning regulations based solely on Respondent's failure to follow state procedures for zoning amendments and in spite of the absence of an entitlement to the zoning application. (Appendix A at 22a-23a.) In so doing, the Sixth Circuit approved the federal law of zoning crafted in its prior decision in *Nasierowski*, *supra*.

Subsequent to the Sixth Circuit's Opinion, the case was returned to the district court for trial on the remaining issue of damages. Trial is scheduled to begin on November 29, 2010.

REASONS FOR ALLOWANCE OF THE WRIT

The Sixth Circuit has crafted a federal law of zoning, which encourages disappointed landowners to bring their local land use disputes to the federal court acting as a federal zoning board of appeals, under which landowners will obtain results more favorable than those they could have obtained in state court. This new rule contradicts this Court's requirements for establishing procedural due process claims by allowing state procedures to be substituted for a vested property interest and by eliminating the requirement of an entitlement based on limits of the discretion of the issuing authority to decide upon the land use application. This federal law of zoning also conflicts with the law of other Circuits, which eschew the role of zoning board of appeals and seek to limit the involvement of the federal courts in local land use disputes.

I. The Sixth Circuit Court of Appeals Has Created a Federal Law of Zoning Applicable to Procedural Due Process Challenges to Local Land Use Decisions, Which Conflicts with the Law of the State, this Court's Precedent, and the Decisions of Other Circuits.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. The Due Process Clause has been interpreted to guarantee both procedural and substantive due process. To obtain relief on a procedural due process claim, the plaintiff must establish the existence of (1) a liberty or property

interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of process. *Shanks v. Dressel*, 540 F.3d 1082, 1090 (9th Cir. 2008). "To prevail on either a procedural or substantive due process claim under 42 U.S.C. §1983, 'a plaintiff must first establish that a defendant's actions deprived plaintiff of a protectible property interest.'" *Nichols v. Bd. of County Comm'rs of the County of La Plata, Colorado*, 506 F.3d 962, 969 (10th Cir. 2007).

This Court has clarified that courts must address whether the plaintiff has a protected property interest before addressing whether the government's "procedures comport with due process." *American Mfrs. Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 59, 119 S. Ct. 977, 989, 143 L. Ed. 2d 130 (1999). "The possession of a protected life, liberty, or property interest is a condition precedent to invoking the government's obligation to provide due process of law." *Stauch v. City of Columbia Heights*, 212 F.3d 425, 429 (8th Cir. 2000).

The Court has established an entitlement test for lower courts to apply to determine whether a protected property interest exists so as to allow a plaintiff to proceed with its procedural due process claim. This entitlement test originated with this Court's decisions in *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), and *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). In *Perry*, the Court adopted the entitlement requirement. "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement

to the benefit and that he may invoke at a hearing." 408 U.S. at 601, 92 S. Ct. at 2699. In *Roth*, the Court added that these rules come not from federal law, but "stem from an independent source such as state law." Further, a unilateral "expectation" is not a property interest. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577, 92 S. Ct. at 2709. Finding a protected property interest, therefore, requires a two-step analysis: 1) is there a state-created and defined property interest and, if so, 2) is it constitutionally protected.

A. The Sixth Circuit's Federal Law of Zoning Contradicts Ohio's Law Regarding the Creation of a Vested Property Right.

In *Roth*, the Court specifically held: "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577, 92 S. Ct. at 2709. "State supreme court decisions are controlling authority for such determinations." *Hamilton v. Myers*, 281 F.3d 520 (6th Cir. 2002). The failure of Respondent to establish the first step, a property interest created and defined under Ohio law, should have ended the due process analysis and prevented any finding of a deprivation or an injunction resulting therefrom.

The law in Ohio is clear as set forth by the highest court in Ohio and cited by the dissent below: "In Ohio, a property owner's right to an existing zoning classification vests 'upon the filing of the application for the [building or zoning] permit.'" (Appendix A at 31a, citing *Gibson v. City of Oberlin*, 167 N.E.2d 651, 654 (Ohio 1960), and *Zaremba Dev. Co. v. City of Fairview Park*, 616 N.E.2d 569, 571 (Ohio Ct. App. 1992).) "It must be pointed out that it is the time of the application for the permit which is crucial in determining whether a zoning change is retroactive." (Emphasis added.) *Laderman & Weiss Realty Co. v. City of Beachwood*, 271 N.E.2d 844, 846 (Ohio 1971). Further, in addition to filing, the permit application must comply with all legislative requirements to create a vested property interest. *Zaremba*, 616 N.E.2d at 571, *citing Gibson*.

The majority below acknowledged it "must look to substantive state zoning laws" (emphasis added) to determine whether Respondent established a vested property interest and specifically found: "It is uncontested that Wedgewood submitted its application for a zoning certificate on June 29, 2004, after the Trustees adopted the Instructions." (Appendix A at 22a.) Under Ohio law, even if the January 19 Instructions amended the existing zoning regulations, Respondent had no vested property right in those zoning regulations or in having its permit approved as there was no application pending at the time the January 19 Instructions were issued. Additionally, Respondent had no vested right based upon the failure

of the zoning application ultimately filed to meet all other legislative requirements.[2]

Nonetheless, the majority ignored the absence of a vested property right, choosing to make the "salient issue" in this threshold determination not whether a property interest had been created and defined under the law of the State of Ohio, but "whether the Zoning Commission had the authority under Ohio law to take the action that it did," issuing the January 19 Instructions without notice and hearing as required of amendments under Ohio Revised Code §519.12. (Appendix A at 23a.) In other words, the "salient issue" according to the Sixth Circuit was whether Petitioners had complied with the procedures attendant to the substantive property right, not whether the substantive property right existed.

Federal law is clear, however, that state procedures fashioned to protect substantive rights are not themselves substantive rights. "Due process is not an end in itself. Rather, the constitutional purpose of Due Process 'is to protect a substantive interest to which ... [a party] has a legitimate claim of entitlement.'" *Hyde Park Company*, 226 F.3d at 1210. "Absent a substantive property interest in the outcome of procedure, [plaintiff] is not constitutionally entitled to

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[2] The district court also found "the Zoning Inspector based her denial on a number of reasons, many of which were unrelated to the January 19 Instructions." "In addition to the Zoning Inspector's finding the requested certificate of appropriateness did not comply with the floating cap set forth in the January 19 Instructions, the Zoning Inspector based her denial of Plaintiff's permit application on" nine reasons unrelated to the January 19 Instructions. (Appendix C at 118a.)

insist on compliance with the procedure itself. 'To hold otherwise would immediately incorporate virtually every regulation into the Constitution.'" *Shanks v. Dressel*, 540 F.3d 1082, 1092 (9th Cir. 2008).

Further, procedures can not be considered limits on discretion sufficient to turn these procedures into substantive rights. As the dissent noted, "'state procedural requirements cannot be the types of 'limits on discretion' that are sufficient to find a property interest. In order for limits on discretion to create property interests, they must be *substantive* limits on discretion.'" (Appendix A at 36a, *citing Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 520 (6th Cir. 2007). "The fact that the state gives the licensee certain procedural rights in determining the substantive right (e.g., an oral hearing, appointed counsel, or two administrative appeals) does not turn those procedural rights into federal due process rights. Nor could it, without simply rendering state procedural law enforceable in federal court." (Appendix A at 33a, *citing Experimental Holdings*, 503 F.3d at 520.

This Court has repeatedly rejected the notion that procedures alone can create a substantive right entitled to procedural due process protection.

> Thus, in every instance of property recognized by this Court as calling for federal procedural protection, the property has been distinguishable from the procedural obligations imposed on state officials to protect it .... [T]he property interest recognized in our cases has always existed apart from state procedural protection before the Court has recognized a

> constitutional claim to protection by federal process. To accede to Gonzales's argument would therefore work a sea change in the scope of federal due process, for she seeks federal process as a substitute simply for state process.... Gonzales's claim would thus take us beyond *Roth* or any other recognized theory of Fourteenth Amendment due process, by collapsing the distinction between property protected and the process that protects it, and would federalize every mandatory state-law direction to executive officers whose performance on the job can be vitally significant to individuals affected.

Town of Castle Rock v. Gonzales, 545 U.S.748, 772, 125 S. Ct. 2796, 2812-13, 162 L. Ed. 2d 658 (2005) (Concurrence)(citations to five U.S. Supreme Court decisions omitted).

In discussing due process claims in zoning cases, the Seventh Circuit has gone so far as to state that "the Constitution does not require state and local governments to adhere to their procedural promises. Failure to implement state law violates that state law, not the Constitution; the remedy lies in state court." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166-67 (7th Cir. 1994). The Sixth Circuit's federal law of zoning ignores the first step of the analysis required by this Court to establish a protected property interest, a state-created and defined property interest, and conflicts with the law of the State of Ohio, which requires the filing of a zoning application that satisfies all other legislative requirements to vest the landowner with a property right in the permit under the existing zoning.

B. The Sixth Circuit's Federal Law of Zoning Contradicts this Court's Entitlement Rule Applicable to Procedural Due Process Claims.

The Sixth Circuit's federal law of zoning also ignores the second step of the procedural due process analysis, establishment of an entitlement based upon limits on the discretion of the state official to deny the sought after land use. In *Gonzales*, 545 U.S. at 756, 125 S. Ct. at 2803, 162 L. Ed. 658, the Court established discretion as the test to determine whether a benefit is an entitlement. "Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Id.*

"In municipal land regulation cases such as this, the entitlement analysis presents a question of law and focuses on 'whether there is discretion in the defendants to deny a zoning or other application filed by the plaintiffs.'" *Hyde Park Company v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000), *citing Norton v. Village of Corrales*, 103 F.3d 928, 931-32 (10th Cir. 1996). "'The entitlement analysis centers on the degree of discretion given the decisionmaker and not on the probability of the decision's favorable outcome.'" *Hyde Park*, 226 F.3d at 1211, *citing Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1116 (10th Cir. 1991).

"In determining whether statutes and regulations limit official discretion, the Supreme Court has explained that we are to look for "'explicitly mandatory language,'" *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must

follow.'" *Ridgely v. Federal Emergency Mgmt. Agency*, 512 F.3d 727, 735-736 (5th Cir. 2008), *citing Ky. Dept. of Corrections v. Thompson*, 490 U.S. 454, 463, 109 S. Ct. 1904 (1989). "Without clearly defined limitations on the City Council's exercise of discretion to assist us in our construction of local law, we hesitate to infer such limits and involve this federal court in a land use regulation dispute which, is purely a matter of local concern." *Hyde Park Company*, 226 F.3d at 1212 (10th Cir. 2000). The district court, in the only decision below to discuss discretion, concluded Liberty Township's Zoning Commission retained "broad discretion."

After concluding the January 19 Instructions effected an amendment to the applicable zoning, the district court proceeded to perform a due process analysis. Although considered under its discussion of Respondent's substantive due process claim, the district court properly applied the entitlement test to Respondent's assertion of "a protected property right in the applied for zoning certificate, as well as the PUD Plan and the corresponding WCC Development Standards." The district court found: "The Liberty Township Zoning Resolution grants the Commission *broad discretion* to determine whether to grant or deny applications for zoning permits. See Liberty Township Zoning Resolution §25.03 (2002). Nothing in the Zoning Resolution states that an applicant is automatically entitled to a requested zoning permit." (emphasis added.) (Appendix C at 116a-117a.) In its subsequent discussion of Respondent's procedural due process claim based on a property interest, the district court repeated its finding Respondent did "*not* have a

bona fide property interest in the zoning permit it seeks." (Emphasis added.)[3] (Appendix C at 122a.)

Left without a protected property interest on which to base a procedural due process claim, the Sixth Circuit's procedural due process analysis should have been at an end. However, instead of affirming the district court's grant of summary judgment to Petitioners on Respondent's procedural due process claim based upon the absence of a protected property interest, the Sixth Circuit proceeded to effectuate the federal law of zoning it had created in its decision in *Nasierowski*, 949 F.2d 890, which requires neither a state-created property interest nor a determination of entitlement based on limits to the discretion of the decisionmaker.

In *Nasierowski*, the plaintiff purchased an undeveloped parcel of real estate based upon the City's representation the proposed development was permitted under the relevant zoning regulations, which classified the property as "general business district". 949 F.2d at 891. Subsequent to the purchase, the City Council adopted a zoning ordinance, which rezoned the property to permit only office development. The plaintiff filed an action in federal court alleging, *inter alia*, a procedural due process claim. The district court concluded the plaintiff had no protected property interest in the prior zoning classification under Michigan law, which provided no

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[3] Unable to establish a protected property interest, the district court concluded, without legal support, that Respondent had a liberty interest in the January 19 Instructions. This conclusion was abandoned by both the Sixth Circuit and Respondent on appeal. (Appendix A at 21a.)

such property interest could have vested until the landowner "had secured a building permit and actually commenced construction on the site." *Id.* at 893.

The Sixth Circuit panel reviewed Michigan law as set forth in *City of Lansing v. Dawley*, 225 N.W. 500 (Michigan 1929), in which the Michigan Supreme Court found the property owner had no vested right in the prior zoning ordinance under which he had been issued a building permit as the work done to the property was insufficient to vest the landowner with a property right in the prior zoning ordinance. The Sixth Circuit then ignored *City of Lansing's* requirement of a building permit and concluded the state court found no vested property right solely because the landowner had not "done *anything of a substantial character* towards the construction of the building." *Nasierowski*, 949 at 897. The Sixth Circuit went on to find the "acquisition of the land was, in and of itself, a *substantial* act" and, in addition to the expenditure of "considerable money and effort," vested the plaintiff with "a property interest in the old zoning classification within which his development was permitted." *Id.* At no point did the Sixth Circuit undertake the second step in the procedural due process analysis. It did not consider whether limits on the discretion of the decisionmaker existed to approve or deny the building permit so as to create an entitlement to its approval.

Binding Sixth Circuit precedent existed at the time, which held the "viability of plaintiff's due process claim depends upon establishing that the local board did not have discretion to deny the proposed lot-split once the plaintiff complied with the mandatory minimal requirements. If, as held by the district court,

the board members had discretion as to whether or not to approve the proposal, then plaintiff had neither a 'legitimate claim of entitlement,' nor a 'justifiable expectation,' in approval of the proposed lot-split. On the other hand, if state law circumscribed the discretion of the board members to the point that approval was mandatory once plaintiff met the minimal requirements of the applicable regulations, then the board members acted illegally." *G.M. Engineers and Associates, Inc. v. West Bloomfield Twp.*, 922 F.2d 328, 331 (6th Cir. 1990).

The *Nasierowski* panel ignored that precedent and its requirement of an entitlement based on limits to the decisionmakers' discretion, as well as Michigan's requirement of a building permit, to find a protected property interest. Thus, the federal law of zoning was created. The City neither sought rehearing *en banc* so as to allow the Sixth Circuit to reconcile the panel decision with prior binding precedent nor filed a petition with this Court seeking issuance of a *writ of certiorari*.

The Sixth Circuit relied on *Nasierowski* to decide *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001), *rev'd in part, vacated in part*, 538 U.S. 188, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003), in which it considered the landowners' claim that a citizens' referendum opposing an ordinance approving the landowners' site plan violated the landowners' procedural due process. Although the district court had granted summary judgment to the City for other reasons, it doubted the landowners could have established a protected property interest under the entitlement analysis based upon the discretion of the City. "The Court is not convinced that the

Developers have established that they had a *due process entitlement* to the building permit simply because Council approved their site plan. Council's approval of the plan was not only discretionary, but *conditional*. It depended on the fulfillment of numerous conditions, one of which was the building of a fence. Although the Developers have successfully argued (for ripeness purposes) that it would have been fruitless to build a fence under the circumstances, the fact is the fence was never built. Without satisfying all conditions, the Developers are hard-pressed to argue that they were constitutionally entitled to a building permit." *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 209 F. Supp. 2d 719, 725 (N.D. Ohio 1996).

The Sixth Circuit relied on *Nasierowski* to ignore the district court's concerns and found "plaintiff's property interest was securely vested upon the City's affirmative representation that the site plan conformed with the existing zoning regulations as reflected by the City's approval, by ordinance, of the site plan." *City of Cuyahoga Falls*, 263 F.3d at 643. The City filed a petition seeking a *writ of certiorari* asking this Court to consider, *inter alia*, whether "the due process clause of the constitution require[s] a municipal corporation to issue building permits when the underlying conditions for the issuance of building permits have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction?" Petition for Writ of Certiorari-Questions Presented for Review at 3, *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 536 U.S. 938 (2002) (No. 01-1269), 2002 WL 32135019. In its petition, the City noted "the approval of the site plan was but one of

many prerequisites to the issuance of building permits. All lawful requirements had to be fulfilled before Buckeye could claim a 'legitimate expectation' to permits." *Id.* at *6. The Court granted the petition to consider this question. However, because the Court found the refusal to issue a building permit while the referendum was pending was not egregious or arbitrary, the Court did not decide the issue of "whether respondents possessed a property interest in the building permits." *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188,198, 123 S. Ct. 1389, 1396, 155 L. Ed. 2d 349 (2003). The Court thus left *Nasierowski* alive and well in the Sixth Circuit.

Following *Nasierowski*, even when lower courts follow the entitlement rule, they are forced to address landowners' citations to *Nasierowski*. See *Seguin v. City of Sterling Heights*, 968 F.2d 584, 591 (6th Cir. 1992)(in spite of the absence of a building permit and Michigan's strict rule requiring both a building permit and some substantial construction before property rights can vest, the landowners argued they had a protected property interest in the prior zoning classification); and *EJS Properties, LLC v. City of Toledo*, 2010 WL 3488702 (N.D. Ohio, W.D. Sept. 2, 2010)(Judge Games G. Carr, dissenting Judge in the Sixth Circuit's opinion below, felt obliged to address *Nasierowski* and *Wedgewood* when considering a procedural due process claim in a land use case even after concluding the landowners had failed to establish a protected property interest).

In *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202-203 (6th Cir. 1995), *cert. denied*, 516 U.S. 816, 116 S. Ct. 70, 133 L. Ed. 2d 31 (1995), the Sixth

Circuit found the landowner had no protected property interest in a special use permit based upon the discretion of the City Council to grant or deny the permit. The landowner advanced the holding in *Nasierowski* to support its claim of a property interest based upon implied contract. *Id.* at 203. The appellate court was forced to distinguish *Nasierowski* on the fact the landowner therein was challenging rezoning instead of seeking a special use permit although the difference in land uses sought should not affect the application of the entitlement rule. The landowner continued to assert *Nasierowski* in a petition filed with this Court seeking *certiorari* for the Court to decide "Whether, despite a discretionary zoning ordinance, a property or liberty interest may arise from contract or implied contract principles?" Petition for Writ of Certiorari, *Triomphe Investors v. City of Northwood*, 516 U.S. 816 (1995) (No. 94-1991), 1995 WL 17047896. The Court denied the landowner's petition. *Triomphe Investors v. City of Northwood*, 516 U.S. 816, 116 S. Ct. 70 (1995).

As set forth in the above-cited cases, litigants and lower courts in the Sixth Circuit are now free to choose whether to follow the federal law of zoning set forth in *Nasierowski* and the Sixth Circuit's opinion below or to follow this Court's entitlement test depending upon the outcome desired. Petitioners seek a *writ of certiorari* to the Sixth Circuit so that this Court may reject the Sixth Circuit's novel federal law of zoning and eliminate the necessity of further judicial resources being devoted to addressing it.

C. The Sixth Circuit's Federal Law of Zoning Leaves the Sixth Circuit Standing Alone Among the Circuits In Eliminating the Requirement of Entitlement to Establish a Procedural Due Process Claim in a Land Use Case.

The Sixth Circuit's federal law of zoning puts it in direct conflict with the other circuits, which follow this Court's entitlement rule and its reliance on limits on discretion in considering procedural due process claims arising out of denials of local land uses. "Despite the lack of Supreme Court guidance, lower federal courts always apply the entitlement rule in procedural due process cases." Mandelker, "Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation," 3 Wash. U. J. L. & Pol'y 61, 65 (2000). See *West Street Group LLC v. Epro*, 564 F. Supp. 2d 84 (D. Mass. 2008), *citing Macone v. Town of Wakefield*, 277 F.3d 1, 9 (1st Cir. 2002) (Discretionary nature of the Zoning Board of Appeals' approval of low income development, as well as in rescinding its approval, prevented approval from being considered an entitlement.); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378-79 (2nd Cir. 1995) (A protected property interest "exists only when 'the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured.'"); *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 679 (3rd Cir. 1991) ("We have held that an entitlement may exist for a benefit sought but not yet obtained if state law limits the exercise of discretion by the state official responsible for conferring the benefit."); *Sylvia Dev. Corp. v. Calvert County, Md.*, 48 F.3d 810, 826 (4th Cir. 1995)(The discretion of the County Board of Commissioners, which barred a claim of entitlement to

approval of an application for a special zoning designation, was evident in the use of the word "may" in the zoning ordinance. Criteria imposed for qualification for the designation were preconditions and not entitlements as "the question of whether criteria are met must be resolved by the exercise of judgment."); *Ridgely*, 512 F.3d at 736 (Eligibility criteria absent "explicitly mandatory language" that the benefit must be awarded if the criteria are satisfied does not establish an entitlement."); *Snaza v. City of Saint Paul, Mn.*, 548 F.3d 1178, 1183 (8th Cir. 2008) ("A permit applicant may have a legitimate claim to entitlement if the government's discretion is constrained by a regulation or ordinance requiring issuance of a permit when prescribed terms and conditions have been met." Further, "[a]pproval of a conditional use permit in Minnesota generally follows as a matter of right only if the permit application meets local requirements for issuance." Ohio law is similar in that a property right vests only if the application meets all other legislative requirements, which the district court found Respondent's application did not."); *Shanks*, 540 F.3d at 1090 (9th Cir. 2008) (Entitlement requires "mandatory language that significantly constrains the decisionmaker's discretion."); *Nichols*, 506 F.3d at 970-71 (10th Cir. 2007) (A property interest exists if discretion is limited by procedures, which, if followed, require a particular outcome, but not if discretion remains. A requirement that the zoning board consider six enumerated factors did not confer entitlement simply because the factors were met."); *Circa Ltd. v. City of Miami*, 79 F.3d 1057, 1061-62 (11th Cir. 1996) (A developer had no protected property interest in a redevelopment plan where the City Charter imposed some limitations on solicitation and review of proposals, but the City Commission with

ultimate authority for selecting proposals was required only to "consider what is 'most advantageous to the city'" making its decision "fully discretionary."); and *3883 Connecticut LLC v. District of Columbia*, 336 F.3d 1068, 1072 (D.C. Cir. 2003) (Official's discretion is to be considered in determining the property interest of an applicant in receiving a permit, as well as in determining the property interest of a permit holder in retaining a permit).

Although the Circuits may divide on the issue of the extent to which discretion must be limited to create an entitlement, discretion remains the determining factor. This divide does not come into play in this case as the district court identified no limits, specifically noting the "broad discretion" of the Zoning Commission, and the Sixth Circuit ignored the issue of discretion in its entirety. The Sixth Circuit is alone in so boldly departing from this Court's entitlement rule.

However, this may not remain the case. Unfortunately, the Sixth Circuit's federal law of zoning has been adopted by lower courts in other circuits creating the possibility of intra-circuit conflicts in those circuits and further division among the circuits. In *Moreland Properties, LLC v. City of Thornton*, 559 F. Supp. 2d 1133, 1148 (D. Colo. 2008), the court followed *Nasierowski's* holding that a "new owner's purchasing of land because of its zoning classification" itself is the "substantial act" sufficient to entitle the landowner to the existing zoning classification in spite of its own reading of Colorado law requiring "the landowner's substantial actions." Additionally, the Sixth Circuit's decision has already been cited in land use practice guides for the federal law created therein, which finds a protected property interest in the zoning

procedures themselves. "Although the developer did not submit a compliant application until after the change was announced, it had a property interest–a 'justifiable expectation'–that the zoning classification would remain the same until amended in compliance with statutory and ordinance procedures for amendment." *Constitutional Law–Due Process*, 62 Plan. & Envtl. L. 366 (October 2010).

Petitioners seek a *writ of certiorari* to the Sixth Circuit to reject the Sixth Circuit's federal law of zoning, to eliminate the inter-circuit conflict created by this law, and to prevent its adoption in other circuits.

D. The Sixth Circuit's Federal Law of Zoning Elevates the Role of the Federal Courts in Local Land Use Disputes In Direct Contradiction to the Attempts of Other Circuits to Extricate the Federal Courts From Such Matters of Local Concern.

The Sixth Circuit's federal law of zoning vitiates this Court's holding that the federal courts should not be in the business of adjudicating local land use decisions. "State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *San Remo Hotel, L.P. v. City and Cty. of San Francisco, Ca.*, 545 U.S. 323, 347, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005). Other circuits agree the federal courts should not be "cast in the role of a 'zoning board of appeals.'" *United Artists Theatre Circuit, Inc. v. Township of Warrington, Pa.*, 316 F.3d 392, 402 (3rd Cir. 2003).

In *United Artists*, Justice Alito, serving as a Judge of the Third Circuit, believing land use decisions to be "matters of local concern," limited the number of substantive due process claims arising out of land use decisions decided by federal courts in the Third Circuit by applying the "shocks the conscience" standard in lieu of the less stringent "improper motive" test. 316 F.3d at 402. The Seventh Circuit has gone even further. In *River Park, Inc.*, 23 F.3d at 165, the court began its opinion addressing the failure of the City to grant a zoning application by stating: "Federal courts are not boards of zoning appeals. The message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges." The Seventh Circuit, even assuming that state law required the City to grant the application, refused to find a procedural due process deprivation as the refusal to follow that law "violates that state law, not the Constitution; the remedy lies in state court." *Id.* at 166-67. The First Circuit similarly found constitutional claims based on rescission of the endorsement of a developer's low-income housing project to have raised a "matter of local concern" and to have been fully reviewable under state law. *Macone*, 277 F.3d at 10-11 (1st Cir. 2002). The court cited its prior holdings to state:

> Every appeal by a disappointed developer from an adverse ruling by a local Massachusetts planning board necessarily involves some claim that the board exceeded, abused, or 'distorted' its legal authority in some manner, ... It is not enough simply to give these state law claims constitutional labels such as 'due process' or

'equal protection' in order to raise a substantial federal question under section 1983.

The Sixth Circuit has cast the federal court in exactly the role other circuits have gone to great lengths to avoid, that of a zoning board of appeals. With the elimination of the threshold determination of a protected property interest created and defined by state law, the Sixth Circuit has established itself as a board of appeals employing a law of zoning that is eminently more amenable to landowners than state law, which would require a state-created and defined property interest and limits on discretion of the decisionmaker.

II. The Sixth Circuit's Refusal to Review the District Court's Decision on Abstention Was Improper, But Necessary to Effectuate Its Federal Law of Zoning.

The initial factual determination as to whether the January 19 Instructions' overall limitation of 500,000 square feet of commercial development was a restatement of or an amendment to existing zoning was resolved differently by the state and federal courts. The BZA, the body to make the factual determination in the state proceedings, determined the overall limitation was included in the original PUD Plan. Respondents attempted to appeal that decision to the Ohio Supreme Court, but ultimately lost. The district court and the Sixth Circuit came to the opposite conclusion.

Whereas the BZA's factual determination would have resolved Respondent's procedural due process claim, the federal courts' interpretations allowed it to

proceed and left the parties with conflicting findings of fact. The federal court could have avoided this conflict by abstaining, as requested by Petitioners, as the federal court was fully aware of the pending state proceedings at the time of its decision, particularly that the state court had remanded the appeal back to the BZA for evidentiary hearings.

In its Opinion and Order on Petitioners' motions to dismiss, the district court, however, denied abstention solely to avoid further delay. (Appendix C at 111a-112a.) Although abstention was fully-briefed by both parties on appeal, the Sixth Circuit refused to address the district court's abstention decision as beyond the scope of its jurisdiction. (Appendix A at 11a-13a.)

The Sixth Circuit relied on its prior decision in *Summers v. Leis*, 368 F.3d 881, 889 (6th Cir. 2004), to find the district court's abstention ruling was not "inextricably linked" with its order granting injunctive relief. However, the Sixth Circuit ignored the portion of its decision in *Summers*, which would have allowed it to review the district court's abstention decision. In *Summers*, 368 F.3d at 890, the Sixth Circuit found abstention was not "critical because, even if the district court is required to abstain under *Younger* and dismiss the suit, such a result has no effect on whether Leis is entitled to qualified immunity. Nothing pertaining to the qualified immunity issue could potentially interfere with ongoing state proceedings, thus review of the court's *Younger* abstention decision is not 'necessary to ensure meaningful review of' the denial of qualified immunity.'"

If the district court had abstained in this case, the parties would have been left with the BZA's conclusion

in the state proceedings that the 500,000 square foot overall limit was part of the PUD Plan as opposed to an amendment thereto and the resulting conclusion that the zoning application was properly denied for the reason it exceeded the overall limit.[4] Such a finding would have obviated any need for a procedural due process analysis and eliminated the possibility of a finding of a deprivation of Respondent's right to procedural due process. The district court's refusal to abstain resulted in the district court finding, contrary to the state court, that the overall limitation of commercial space in the January 19 Instructions amended the PUD Plan. That allowed the district court to proceed with a due process analysis, and to find a deprivation of procedural due process resulting in a permanent injunction, which was considered by the Sixth Circuit on appeal.

In *Summers*, regardless of whether the federal court abstained, Leis would have been entitled to qualified immunity. In the case at bar, had the federal court abstained, Respondent would not have been entitled to a permanent injunction. The issue of abstention was clearly "inextricably intertwined" with the appealable decision on the permanent injunction.

Further, the decision on abstention interfered with the state court proceedings as the matter remains before the federal court on the issue of damages for a procedural due process deprivation in spite of the state

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[4] Both the BZA and the district court agreed the zoning application would have been denied regardless of the January 19 Instructions based upon failures to meet zoning requirements unrelated to the overall limit.

court's finding of no such deprivation. The holding in *Summers* called for the Sixth Circuit to consider the district court's ruling on abstention; however, to do so might have deprived the Sixth Circuit of the opportunity to effectuate its federal law of zoning.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a *writ of certiorari*.

Respectfully submitted,

Lawrence E. Barbiere
Ohio Supreme Ct. #0027106
Counsel of Record
Schroeder, Maundrell,
Barbiere & Powers
5300 Socialville Foster Road
Suite 200
Mason, OH 45040
(513) 583-4200
(513) 583-4203 (fax)
lbarbiere@smbplaw.com

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-4446

[Filed June 28, 2010]

WEDGEWOOD LIMITED PARTNERSHIP I, *Plaintiff-Appellee*,	)
v.	)
TOWNSHIP OF LIBERTY, OHIO; BOARD OF TRUSTEES OF LIBERTY TOWNSHIP; ROBERT MANN, PEGGY GUZZO, and CURT SYBERT, in their official capacities as Liberty Township Trustees; and HOLLY C. FOUST, in her official capacity as Liberty Township Zoning Inspector, *Defendants-Appellants.*	)

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 04-01069—Algenon L. Marbley, District Judge.

Argued: December 4, 2009

Decided and Filed: June 28, 2010

Before: GRIFFIN and KETHLEDGE, Circuit Judges; CARR, District Judge.*

COUNSEL

ARGUED: Michael W. Currie, THOMPSON HINE LLP, Columbus, Ohio, for Appellants. Joseph R. Miller, VORYS, SATER, SEYMOUR AND PEASE LLP, Columbus, Ohio, for Appellee. **ON BRIEF:** Michael W. Currie, Scott A. Campbell, O. Judson Scheaf, III, Michele L. Noble, THOMPSON HINE LLP, Columbus, Ohio, Lawrence E. Barbiere, SCHROEDER, MAUNDRELL, BARBIERE & POWERS, Mason, Ohio, for Appellants. Bruce L. Ingram, VORYS, SATER, SEYMOUR AND PEASE LLP, Columbus, Ohio, for Appellee.

GRIFFIN, J., delivered the opinion of the court, in which KETHLEDGE, J., joined. CARR, D. J. (pp. 21-26), delivered a separate dissenting opinion.

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* The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

GRIFFIN, Circuit Judge. Defendants Township of Liberty, Ohio, its Board of Trustees, and its zoning inspector (collectively the "Township") appeal the district court's order enjoining it from applying a set of zoning instructions against a parcel of property owned by plaintiff Wedgewood Limited Partnership I ("Wedgewood"). This dispute arose more than six years ago, when Wedgewood applied for a zoning certificate to develop a Wal-Mart Supercenter ("Wal-Mart") in Liberty Township's Wedgewood Commerce Center. The Township's residents rallied against the retail giant, hoping to prevent the store's construction. Their elected Board of Trustees responded by enacting zoning instructions that adversely affected Wedgewood's ability to develop a large commercial structure on its property. When Wedgewood's agreement with Wal-Mart collapsed, it filed this civil rights action pursuant to 42 U.S.C. § 1983.

We hold that the Township violated Wedgewood's procedural due process rights when the Township adopted zoning instructions that, in effect, amended the Wedgewood Commerce Center planned unit development without providing Wedgewood with notice and an opportunity to be heard. Accordingly, we affirm the order of the district court granting a permanent injunction.

I.

On November 18, 1991, the Liberty Township Board of Trustees ("Trustees") legislatively approved the Wedgewood Commerce Center ("WCC"), a planned unit development ("PUD") in Liberty Township, Ohio. A PUD is a unique creature of zoning because the entire development carries one nominal zoning classification only, but its subdivisions contain many different kinds of approved land use, including, for example, zoning for single-family dwellings, multi-family units, schools, recreational facilities, and commercial developments. The zoning restrictions applicable in each PUD subdivision "are ascertainable only by referring to the approved plats for [] development." *Gray v. Trs. of Monclova Twp.*, 313 N.E.2d 366, 367, 369 n.4 (Ohio 1974).

Leading up to the November 18, 1991, vote, parameters for the WCC's land use were negotiated at length between the Trustees and Charles Ruma & Associates, one of the applicants seeking approval for PUD re-zoning.[1] Before voting to approve the WCC, Trustee John C. Werner asked whether the WCC development plan, as amended, would be "incorporated into a document for the Township records." Mr. David Dye, an attorney for Charles Ruma & Associates, responded, "Yes, it would."

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[1] Charles Ruma is also the president of Wedgewood. In 1991, Ruma's company, Charles Ruma & Associates, applied to re-zone a 345-acre plat of vacant land from "farm residential" to PUD to develop the WCC.

On February 20, 1992, a document was received by, and filed with, the Liberty Township Zoning Commission ("Commission") entitled "Wedgewood Commerce Center - Development Standards." This document contained, among other things, individual development criteria and zoning information for each subdivision, a map labeled "WCC Land Use Plan[,]" and Addendum A, entitled "Wedgewood Commerce Center Summary of Site Data." According to this document (hereinafter "WCC Development Plan" or "WCCDP"), only subareas 3, 8, and 9 were zoned for commercial development.[2]

Nevertheless, between 1992 and 2003, the owners of subareas 4, 5, 6, and 10, plats all originally designated for suburban office use only, sought approval for and obtained permits to build commercial structures. According to the Township, by late 2003, subareas 4, 5, 6, and 10 contained approximately 390,611 square feet of commercial space.

Wedgewood owns lot 2069, designated as subarea 3, a 32.36 acre plat of land in the WCC and the subject of the parties' protracted litigation. According to the WCCDP, subarea 3 is zoned for commercial development and is allotted a maximum of 220,857 square feet of commercial building space. The square footage of subareas 3, 8, and 9, when combined, permit

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[2] Since it was filed with the Commission, the WCCDP has governed the permissible zoning in the WCC. Liberty Township's zoning inspector, Holly Foust, as well as her predecessor, referred to the WCCDP as the WCC "official book[.]" The WCCDP is also labeled, in handwritten script on the front page, "Official Book[.]"

a total of 499,930 square feet of commercial development in the WCC.[3]

At a public Trustees meeting in September 2003, a resident of Liberty Township voiced her "concern[]" about "rumors" that a Wal-Mart or Lowe's was moving into the WCC, asserting that the development was becoming too "commercial." The resident asked Trustee Werner, "can we do anything about it?" He replied, "those hearings were . . . years ago, and the public had their shot then, and basically [the WCCDP] was approved."

The rumors proved to be true. In October 2003, Wedgewood submitted an application to the Commission requesting an amendment to the WCCDP, specifically, six zoning variances to develop a 227,825 square foot Wal-Mart and fueling station on subarea 3.[4] While its variance application was pending, Liberty Township residents contacted the Commission to express their objection to the proposed Wal-Mart. On October 22, 2003, the Commission held a public hearing addressing Wedgewood's application. After

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[3] According to the WCCDP, subarea 8 is a 21.18 acre plat of land zoned for commercial use and is allotted a maximum of 144,553 square feet of commercial building space. Subarea 9, a 19.71 acre plat, is also zoned for commercial land use and permits 134,520 square feet of commercial building space. The total acreage of subareas 3, 8, and 9 is 73.25 acres.

[4] Wedgewood sought these variances, in part, because subarea 3 permitted only 220,857 square feet of commercial development. The proposed Wal-Mart, however, would require an additional 6,968 square feet of commercial space. Thus, Wedgewood needed an amendment to the WCCDP zoning map to build a commercial structure on subarea 3 that exceeded its allotted square footage.

considering statements from several residents, many of whom were opposed to the Wal-Mart, the Commission denied Wedgewood's application for an amendment to the WCCDP that would allow subarea 3's commercial development to exceed 220,857 square feet.

Over the next several months, public opposition to the Wal-Mart intensified. To address the public's concerns, the Trustees held two public meetings on December 1 and 15, 2003. Trustee Peggy Guzzo also coordinated "petition drive[s]" gathering "a total of 1,150 signatures" from anti-Wal-Mart residents. After these meetings, the Trustees asked Liberty Township's zoning inspector, defendant Holly Foust, to produce a report detailing the prior zoning certificates issued by the Commission and the combined square footage of all commercial structures located in the WCC.

On January 19, 2004, the Trustees issued a "Public statement and Instructions to Zoning Department Regarding Future Administration of Wedgewood Commerce Center Development Plan" (hereinafter "Instructions"). These Instructions, which form the crux of Wedgewood's constitutional claims, state, in relevant part:

> On a general basis, we have certainly heard our constituents' requests and desires to do what is possible to deter excessive and regional types of commercial development in our community. As a Board we, like other residents in our community, are interested in employing our current regulations, and developing and adopting new regulations, to avoid, as possible, and limit, where possible, the burdens that "big

box" types of retail facilities place upon the infrastructure of our community.

* * *

Extensive review and analysis of the Wedgewood Commerce Center development plan, the minutes of the meetings which led to the approval of that plan, the policies that have been followed to date in administering that plan, and the discernable intent of all of the parties expressed during the conception and the process which led to the approval of the plan, has led us to conclude that the ultimately adopted plan imposed a "floating" maximum of 500,000 sq. ft of "commercial" development in the Wedgewood Commerce Center. We have found evidence of the establishment of this limit in a number of different documents. Moreover, we have found no documents or proof through amendment processes which modified this "overall" square footage cap, as best as we can conclude. The subject of whether or not an acreage "cap" also applies has been more difficult.

* * *

The analysis reveals that the commercial development completed to date, and substantially through the approval process, has consumed most of the commercial square footages [sic] imposed by the development plan as an overall cap.

* * *

> Under these circumstances, we have determined that, except for a few modest projects which have already completed the two-step "major" administrative review process, all additional applicants seeking to construct retail or other arguable "commercial" development in the Wedgewood Commerce Center will be required to seek approval as a "major" plan of modification. In other words, we are instructing our zoning department to refrain from issuing zoning certificates for any additional commercial development in the Wedgewood Commerce Center, to issue such permits only after an approval through the "two-step" major process has been completed. Each process will be considered to be an application to consume any remaining portion of the square footage limitation, or exceed that limitation, and as a modification to expand the acreage limitation which we believe has been met.

Six months later, Wedgewood filed its application with the Commission for a zoning permit to build a smaller, approximately 220,598 square foot Wal-Mart and fueling station on subarea 3. Unlike its October 2003 application, Wedgewood did not seek a variance to permit construction that surpassed subarea 3's 220,857 square feet of approved commercial space. Wedgewood did not submit its application as a major plan of modification, as specified in the newly adopted Instructions.

On September 30, 2004, the Commission denied Wedgewood's application for a zoning certificate. In its denial letter, the Commission stated that the

Instructions were "made a part of [the Commission's] decision by [] reference" and articulated several reasons for denying the permit, including: (1) failure to meet the "requirements of the currently effective [WCCDP]"; (2) "exceed[ing] the maximum allowable commercial acreage and [500,000] square footage limitation[] that were expressly made a part of the development plan"; (3) failure to obtain WCC architectural review committee approval; and (4) inconsistencies with the governing Liberty Township Zoning Resolution. Wedgewood appealed the Commission's denial of its zoning certificate to the Liberty Township Board of Zoning Appeals ("BZA"). This appeal ("BZA I") preceded the ongoing state-court proceedings that have paralleled Wedgewood's federal litigation.

On November 5, 2004, before the BZA decided BZA I, Wedgewood filed the present action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Southern District of Ohio. Wedgewood's federal complaint alleged, *inter alia*, that the Trustees' adoption of the Instructions constituted an unauthorized amendment to the WCCDP, violating its state and federal due process rights, or, in the alternative, that the WCCDP was unconstitutionally vague. Several local homeowner associations intervened and joined the Township's efforts to dismiss Wedgewood's federal complaint. The application of various abstention doctrines was one of many arguments advanced by the Township and interveners. Thereafter, the district court granted in part and denied in part the parties' Fed. R. Civ. P. 12(b)(6) motions and rejected their arguments for abstention.

Subsequently, the parties filed cross-motions for summary judgment. In September 2008, almost five years after Wedgewood first applied to construct the Wal-Mart, the district court granted its motion for summary judgment with respect to its vagueness and procedural due process claims. The district court's constitutional rulings were dependant upon its finding that the Instructions amended the WCCDP without providing Wedgewood with advanced notice and a hearing in violation of Ohio Rev. Code § 519.12. The district court's order enjoined the Township from enforcing the Instructions and, in particular, the 500,000 square foot floating cap (hereinafter "floating commercial cap") against Wedgewood's property. The Township timely appeals.

II.

We have jurisdiction to decide this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) because the district court entered a permanent injunction against the Township. As a general rule, our jurisdiction is confined to the issues necessary to determine the propriety of the district court's injunction. *See Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP*, 423 F.3d 539, 545 (6th Cir. 2005); *Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 797 (6th Cir. 1998); 16 Arthur R. Miller, Edward H. Cooper, Vikram David Amar, *Federal Practice & Procedure* § 3921.1 (2d ed. 1996 & 2009 Supp.).

Because the scope of our jurisdiction is limited by § 1292(a)(1), we may not reach the Township's arguments challenging the district court's abstention ruling. The district court's refusal to abstain is embodied in its order granting in part and denying in

part the Township's motion to dismiss, an order that is not presently before us. *See Summers v. Leis*, 368 F.3d 881, 889 (6th Cir. 2004). In this regard, we reject the Township's perfunctory argument that the district court's abstention ruling is "inextricably intertwined" with its order granting injunctive relief. *See United States v. Phinazee*, 515 F.3d 511, 520 (6th Cir. 2008) (holding that a party forfeits an issue that is "adverted to . . . in a perfunctory manner unaccompanied by some effort at developed argument.").

In *Summers*, we described the narrow scope of our pendent appellate jurisdiction:

> Pendent appellate jurisdiction refers to the exercise of jurisdiction over issues that ordinarily may not be reviewed on interlocutory appeal, but, may be reviewed on interlocutory appeal if those issues are "inextricably intertwined" with matters over which the appellate court properly and independently has jurisdiction. *Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 797 (6th Cir. 1998). This circuit has interpreted "inextricably intertwined" to mean that the resolution of the appealable issue "necessarily and unavoidably" decides the nonappealable issue.

368 F.3d at 889 (some internal citations omitted).

"The 'inextricably intertwined' requirement of pendent appellate jurisdiction is not meant to be loosely applied as a matter of discretion; rather, such jurisdiction only may be exercised when the appealable issue at hand cannot be resolved without addressing the nonappealable collateral issue." *Chambers*, 145

F.3d at 797 (citing *Archie v. Lanier*, 95 F.3d 438, 443 (6th Cir.1996)). Moreover, we have previously declined to exercise our pendent appellate jurisdiction over a district court's abstention ruling when the resolution of that issue "require[s] the application of [a] separate and distinct legal standard[.]" *Summers*, 368 F.3d at 889. Such is the case here. Because we are able to resolve the propriety of the district court's injunction without reaching its abstention ruling, we decline to review it. *See Chambers*, 145 F.3d at 797.

Despite its status as the appellant, the Township also argues that the issues raised by this appeal are moot. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Ford v. Wilder*, 469 F.3d 500, 504 (6th Cir. 2006) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969). "The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties." *Ford*, 469 F.3d at 504 (citation and internal quotation marks omitted).

The Instructions, as applied to the WCCDP, affect the permissible zoning in subarea 3. Specifically, the floating commercial cap provision and the major modification procedure will continue to inhibit Wedgewood's ability to develop a maximum of 220,857 square feet of commercial space on its property. Thus, contrary to the Township's position, the evaporation of Wal-Mart's offer to purchase subarea 3 does not extinguish Wedgewood's legally cognizable interest in securing a judgment that enforces its right to develop its property according to the WCCDP zoning as it existed before the Instructions.

In this regard, our mootness analysis highlights a key distinction between Wedgewood's federal and state litigation. Wedgewood's state court proceedings challenge the zoning inspector's denial of its application for a zoning certificate to develop a 220,598 square foot Wal-Mart on subarea 3. In contrast, Wedgewood's federal litigation involves its claim that the Trustees violated its procedural due process rights by enacting the Instructions without notice and a public hearing. Although each proceeding requires an interpretation of the WCCDP, the harm alleged and the relief sought are distinct.

III.

"A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 466 F.3d 391, 394 (6th Cir. 2006) (citing *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006). "In determining whether a district court has properly granted a permanent injunction, we review factual findings for clear error, legal conclusions de novo, and the scope of injunctive relief for abuse of discretion." *Gibson Guitar Corp.*, 423 F.3d at 546 (internal citation and quotation marks omitted).

In the usual course, a district court should conduct an evidentiary hearing before issuing a permanent injunction. *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1174 (6th Cir. 1995). However, because "no factual issues remain[ed] for trial, the district court's decision to grant a permanent injunction without such a hearing [can] still be upheld" if it properly granted

summary judgment for Wedgewood. *See Gibson Guitar Corp.*, 423 F.3d at 546 (internal citation and quotation marks omitted). Accordingly, resolution of the Township's appeal from the district court's permanent injunction requires us to analyze the district court's summary judgment rulings as to Wedgewood. *Id.*

Summary judgment should be granted whenever "there is no genuine issue as to any material fact and [] the movant is entitled to a judgment as a matter of law." Fed. Civ. P. 56(c). Thus, only disputed material facts, those "that might affect the outcome of the suit under the governing law[,]" will defeat summary disposition. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In addition, the standard of review applicable to cross-motions for summary judgment does not differ from the standard we apply when reviewing a Fed. R. Civ. P. 56(c) motion filed by only one party. *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991).

To establish a procedural due process violation under 42 U.S.C. § 1983, Wedgewood is required to demonstrate three elements: (1) that it had a life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment; (2) that it was deprived of that protected interest within the meaning of the due process clause; and (3) that the state did not afford it adequate procedural rights before depriving it of its protected interest. *See Med. Corp., Inc. v. City of Lima*, 296 F.3d 404, 409 (6th Cir. 2002).[5]

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[5] Procedural due process and vagueness claims brought under the Ohio Constitution are governed by the same legal standards

Wedgewood will prevail on its procedural due process claim if it: (1) demonstrates that it was deprived of a liberty or property interest as a result of an "established state procedure[,]" which itself violates procedural due process rights; or (2) establishes that the Township deprived it of a liberty or property interest "pursuant to a random and unauthorized act" and available state remedies would not adequately compensate it for the loss that it suffered. *Mertik v. Blalock*, 983 F.2d 1353, 1365 (6th Cir. 1993); *see Macene v. MJW, Inc.*, 951 F.2d 700, 706 (6th Cir. 1991).

A.

Because the district court's injunction turned on its conclusion that the Instructions improperly amended the WCCDP, we begin our analysis with this ruling. The parties agree that Ohio law governs our interpretation of the WCCDP. *See, e.g., Miamisburg v. Wood*, 739 N.E.2d 410, 412 (Ohio Ct. App. 2000) (relying upon Ohio law to interpret an Ohio city ordinance).

When interpreting zoning ordinances, or, in this instance, the WCCDP, we must presume that the WCCDP and Instructions "mean what [they] say[]." *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862, 1868 (2009) (Stevens, J., concurring). In addition, our "interpretation of [the WCCDP] should serve to

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applicable to the federal constitution. *Sorrell v. Thevenir*, 633 N.E.2d 504, 511 (Ohio 1994); *Warren v. City of Athens, Ohio*, 411 F.3d 697, 704 n.6 (6th Cir. 2005). Thus, we analyze Wedgewood's state and federal constitutional claims simultaneously.

illuminate its meaning, rather than to render portions of it meaningless." *Cardani v. Olsten Home Healthcare*, No. 97AP1200833, 1998 WL 549374, at *3 (Ohio Ct. App. July 31, 1998).

Article XIV of the Liberty Township Zoning Resolution § 14.06(F) states:

> Any significant changes to an Approved Development Plan in a Planned Commercial and Office District shall be considered an Amendment to the Zoning Map and shall only be made in accordance with Article XXVII of this Resolution. [6]

Article XXVII of the Liberty Township Zoning Resolution "is . . . a restatement of Section 519.12 of the Revised Code of Ohio[,]" which requires advanced notice and a public hearing before the Trustees can adopt an amendment to an existing PUD development plan.

The Township asserts that the district court erred when it ruled that the Instructions constituted an amendment to the WCCDP rather than a clarification of its existing restrictions, including the floating commercial cap. It contends that the true amendment occurred on November 18, 1991, when the Trustees voted to restrict the WCCDP to 1,000,000 square feet of office space, 500,000 square feet of commercial space, and 750 residential units. According to the

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[6] Notably, this provision appears directly below Article XIV subpart F, which specifically addresses subdivided plats in PUD developments.

Township, the 500,000 square foot floating commercial cap is reflected in the following November 15, 1991, amendment to the WCCDP:

> B. *Subarea Development Criteria*
>
> 1. Criteria Generally
>
> a) Density
>
> * * *
>
> 3) Commercial. Gross square footage of commercial construction shall not exceed Five Hundred Thousand (500,000) square feet.

The Township also claims that the floating commercial cap is memorialized in Addendum A of the WCCDP:

> WEDGEWOOD COMMERCE CENTER
> SUMMARY OF SITE DATA

I. TOTAL LAND USE	ACRES	MAX: GROSS BLDG AREA	DENSITY
COMMERCIAL	73.26 AC	500,000 S.F	6,825.00 SF/AC
OFFICE	114.68 AC	1,000,000 S.F.	8,719.92 SF/AC
RESIDENTIAL	104.14 AC		

The Township further maintains that the floating commercial cap is recorded in the November 18, 1991, Trustees meeting notes, wherein it was mentioned

that the WCC would contain "500,000 square feet of commercial development."

In response, Wedgewood concedes that the WCCDP reflects a total gross building area of 500,000 square feet of commercial space. It counters, however, that a floating cap on commercial development was never contemplated by the parties. According to Wedgewood, any WCC document that reports a total of 500,000 square feet of commercial space simply reflects a summary of the WCCDP's approved commercial land use in subareas 3, 8, and 9 only.

We agree with Wedgewood's interpretation of the WCCDP. Accepting the Township's position, i.e., that Addendum A's reference to a "max. gross bldg. area" of 500,000 square feet reflects the parties' intent to apply a floating commercial cap to all subdivisions within the WCC would render meaningless the WCCDP's express designation of subareas 3, 8, and 9 as the only commercial subareas. Put another way, if commercial development were permissible or intended in subareas other than subareas 3, 8, or 9, it would have been superfluous to assign a specific land use category to each subarea. In addition, the Township's interpretation of the WCCDP would require us to ignore the strong correlation between Addendum A's reported 500,000 square feet of commercial building space and the combined square footage of subareas 3, 8, and 9, which totals 499,930 square feet.

Moreover, Addendum A's density calculation is telling. It divides 500,000 square feet of gross commercial building space by a total acreage area of 73.26 acres, the total acreage of subareas 3, 8, and 9 (within one-hundredth of one point), for a total density

of 6,825 square feet of commercial space per acre. Thus, Addendum A specifically configures its commercial density calculation by dividing the total amount of commercial building space permitted in those subareas with the total acreage of subareas 3, 8, and 9. This calculation directly contradicts the Township's claim that the 500,000 square feet of approved commercial development within the WCC was not specifically tethered to subareas 3, 8, and 9.

We conclude, as the district court did, that the WCCDP, as amended, contemplated commercial development in subareas 3, 8, and 9 only; therefore, there was no "floating" commercial cap in the WCCDP before the enactment of the Instructions. In this regard, we agree with the district court's conclusion that, even though the Township and Wedgewood "turn[ed] a blind-eye toward the [specific] location requirements for commercial development expressed in the [WCCDP] for thirteen years[,] [it] does not somehow change the maximum allowable commercial development [permitted] in subareas 3, 8, or 9."

The Township's enactment of the floating commercial cap provision, as articulated in the Instructions, effectively reduced the total square footage of commercial space permitted in subarea 3. We therefore hold that the Instructions constituted a "significant change[] to an approved Development Plan[,]" thus requiring an "Amendment to the Zoning Map[.]" *See* Liberty Township Zoning Resolution § 14.06 (F).

For these reasons, we conclude that the district court did not err in ruling that the Instructions constituted an amendment to the WCCDP that

triggered Ohio Rev. Code § 519.12's advance notice and public hearing requirements.

B.

Next, the Township argues that the district court erred in ruling that Wedgewood had a protected liberty interest in the amendment procedures discussed above. Wedgewood, however, has abandoned the district court's liberty-based analysis and requests that we affirm the district court's favorable ruling on its procedural due process claim on the separate ground that it had a property interest in subarea 3's zoning before the Trustees enacted the Instructions.[7]

"Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

"In determining whether [Wedgewood] established a vested property interest, we must look to substantive state zoning laws." *Dorr v. City of Ecorse*, 305 F. App'x 270, 275 (6th Cir. 2008) (unpublished) (citing *Silver v.*

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[7] In its appellate brief, Wedgewood requests this court to review its case "under the property wing of procedural due process." Moreover, Wedgewood has not provided a liberty-based argument for our consideration and has therefore forfeited the issue. *See Phinazee*, 515 F.3d at 520 (holding that a party forfeits an issue that is "adverted to in a perfunctory manner unaccompanied by some effort at developed argument").

Franklin Twp. Bd. of Zoning Appeals, 966 F.2d 1031, 1036 (6th Cir. 1992)). In *Silver*, we stated that a party obtains a protected property right under the Fourteenth Amendment when it can demonstrate a "'legitimate claim of entitlement' or a 'justifiable expectation' in the approval of his [building] plan." *Silver*, 966 F.2d at 1036 (citations and quotation marks omitted).

In Ohio, it is well-established that a landowner's right to an existing zoning classification vests upon his submission of an application for a building or zoning certificate. *Gibson v. Oberlin*, 167 N.E.2d 651, 654 (Ohio 1960). However, vesting does not occur unless the

> property owner has complied with all the legislative requirements for the procurement of a building permit and his proposed structure falls within the use classification of the area in which he proposes to build it, [– if these conditions are met] he has a right to such permit, and there is a duty on the part of the officer charged therewith to issue it.

Zaremba Dev. Co. v. Fairview Park, 616 N.E.2d 569, 571 (Ohio Ct. App. 1992) (quoting *Gibson*, 167 N.E.2d at 654).[8]

It is uncontested that Wedgewood submitted its application for a zoning certificate on June 29, 2004,

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[8] It is unclear under Ohio law whether Wedgewood's October 2003 application qualifies as a building permit under *Gibson* and *Zaremba Dev. Co.*

after the Trustees adopted the Instructions. Because Wedgewood submitted its application post-Instructions, the Township argues that Wedgewood cannot demonstrate a vested property interest in its zoning classification under *Gibson* and *Zaremba Dev. Co.* We disagree.

The salient issue before us "is whether the Zoning Commission had the authority under Ohio law to take the action that it did." *Stile v. Copley Twp.*, 115 F. Supp. 2d 854, 865 n.21 (N.D. Ohio 2000). In *Stile*, a zoning commission eliminated a formerly permitted land use classification in a PUD where the plaintiff owned property. *Id.* at 859. The plaintiff intended to sell a section of his property to an automobile dealership, but the sale collapsed when the parties discovered that the township's zoning commission had eliminated the "community/regional sales" zoning classification as a "permitted use" in the PUD. *Id.*

The *Stile* court ruled that the plaintiff had demonstrated a protected property interest in the "community/regional sales" zoning classification because:

> the change made . . . by action of the Township Zoning Commission was in the nature of a zoning amendment . . . . [and the] action was beyond the scope of the Zoning Commission's authority, since the legislative action of amending a zoning classification can only be taken by the Township Board of Trustees after following the notice and hearing procedures set forth in Ohio Rev. Code § 519.12.

Stile, 115 F. Supp. 2d at 865 (footnote omitted). Like the Township here, the township in *Stile* asserted that the plaintiff did not have a vested property interest in the existing zoning classification under *Zaremba Dev. Co. Id.* at 865. The district court characterized the township's argument as "a red herring[,]" noting that the proper issue was whether the zoning commission had the authority to eliminate the zoning classification without complying with § 519.12's notice and hearing requirements. *Id.* The district court concluded that the zoning commission's actions were improper and granted the plaintiff's request for injunctive relief. *Id.* at 866.

In *SuperValu Holdings, Inc. v. Jackson Ctr. Assocs., LP*, Nos. CA2005-09-085, CA2005-09-089, 2006 WL 1843588, at *4 (Ohio Ct. App. July 3, 2006), the Ohio Court of Appeals acknowledged the property right discussed in *Stile*:

> In *Stile*, a township zoning commission eliminated a "permitted use" in a Planned Development District where the plaintiff owned property. *Id.* at 858-859. The plaintiff had intended to sell part of his property to an automobile dealership, but such a sale was not feasible following the elimination of "community/regional sales" as a "permitted use." *Id.* In *Stile*, state action affected the plaintiff's property rights by restricting how the plaintiff could use his property.

Id. at *4. Although *SuperValu Holdings, Inc.*, does not expressly adopt *Stile*'s holding, it acknowledged that a protectable property interest can arise under Ohio law when a government entity restricts a landowner's

ability to use his property. *Id.* The facts in *Stiles* are similar to the facts in this case.

For these reasons, we conclude the Ohio courts would hold that, consistent with *Roth, Silver, Stile*, and *SuperValu Holdings, Inc.*, Wedgewood had a "justifiable expectation" that its zoning classification – its right to develop up to 220,857 square feet of commercial space on subarea 3 – was vested unless or until the Commission and Trustees passed an amendment to the WCCDP comporting with the notice and hearing requirements set forth in Ohio Rev. Code § 519.12. *See Silver*, 966 F.2d at 1036 (quoting *Roth*, 408 U.S. at 577, and *Olim*, 461 U.S. at 245); *Dorr*, 305 F. App'x at 275. Specifically, Articles XIV § 14.06 (F) and XXVII of the Liberty Township Zoning Resolution, Ohio Rev. Code § 519.12, and the WCCDP itself, provided the "rules" and "understandings" under Ohio law "that secure[d] . . . [its] claim[] of entitlement" to its zoning classification. *See Roth*, 408 U.S. at 577. Similar to the plaintiffs in *Stile*, Wedgewood possessed a protected property interest in subarea 3's zoning, notwithstanding the Trustees' *ultra vires* amendment. *See generally, Cole v. Twp. of Clinton*, No. 17-91-6, 1991 WL 274246, at *4 (Ohio Ct. App. Dec. 19, 1991) (unpublished).

C.

Finally, we must analyze whether the Township's enactment of the Instructions without providing notice and a hearing deprived Wedgewood of a protected property interest within the meaning of the Due Process Clause. In this regard, it is well-established that violations of state law do not "automatically translate into a deprivation of procedural due process

under the United States Constitution." *DePiero v. City of Macedonia*, 180 F.3d 770, 788 (6th Cir. 1999). The Supreme Court has described "the root requirement" of the Due Process Clause as notice and an opportunity to be heard before one is deprived of a significant property interest. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

In *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), a plaintiff-landowner claimed that the city counsel violated his procedural due process rights by enacting a zoning amendment designed to prevent him from proceeding with his proposed commercial development. *Id.* at 891. The district court granted summary judgment in favor of the city and denied the landowner's request for an injunction prohibiting the enforcement of the new zoning ordinance against his property. *Id.* at 893. We reversed, holding that the landowner "was not provided with notice of a proposed change in the zoning ordinance, a change that would exert a severely detrimental impact on his ability to use the property in a manner consistent with his legitimate expectations – expectations that the City, itself, had encouraged." *Nasierowski Bros. Inv. Co.*, 949 F.2d at 895. We held:

> Governmental determinations of a general nature that affect all equally do not give rise to a [Constitutional] due process right to be heard. But, when a relatively small number of persons are affected on individual grounds, the right to a hearing is triggered. Falling into that latter category is the situation where, during the [zoning] amendment process, a governmental

> unit singles out and specifically targets an individual's property for a zoning change . . . .
>
> * * *
>
> Thus, in these circumstances [the plaintiff-landowner] had a right to notice and hearing prior to [the] Council's vote on [the] proposed amendment. The City's failure to afford [the plaintiff-landowner] an opportunity to be heard constituted a denial of procedural due process.

Nasierowski Bros. Inv. Co., 949 F.2d at 896 (footnote omitted).

We find the reasoning of *Nasierowski Bros. Inv. Co.* persuasive. Here, there is ample evidence in the record to support the district court's conclusion that the Instructions were not "general [in] nature[,]" but rather targeted or singled-out Wedgewood's ability to construct a Wal-Mart on its property. *Nasierowski Bros. Inv. Co.*, 949 F.2d at 896. Thus, to satisfy the Due Process Clause, the Township was required to apprise Wedgewood of the pendency of the Instructions and provide adequate notice and an opportunity to present their objections. *DePiero*, 180 F.3d at 788. The Township failed to do so.

Accordingly, we hold that the Instructions, which purported to clarify the WCCDP, unlawfully amended it without affording Wedgewood adequate notice and a hearing in violation of the Due Process Clause and Ohio Rev. Code § 519.12.

We also conclude that the Trustees' enactment of the Instructions constituted "an established state procedure" that itself violated Wedgewood's procedural due process rights. An "established state procedure" is defined as "the mechanism that effects a deprivation or contributes to cause a deprivation[.]" *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 199 (6th Cir. 1987) (citation and internal quotation marks omitted). In *Zinermon v. Burch*, 494 U.S. 113, 132-39 (1990), the Supreme Court stated that a government act constitutes "an established state procedure" when officials with the authority to supply a hearing fail to provide one even though they should have foreseen the need to provide such procedural protections. *See also Harris v. City of Akron*, 20 F.3d 1396, 1401-02 (6th Cir. 1994); Erwin Chemerinsky, *Federal Jurisdiction*, § 8.9 at 581 (5th ed. 2007). Here, the Commission and Board of Trustees are the government entities that should have foreseen, and could have provided, the exact procedural protection that Wedgewood claims it was denied.

IV.

We conclude that the district court properly granted summary judgment in favor of Wedgewood on its procedural due process claim.[9] *Dixon v. Clem*, 492

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[9] Because we hold that the district court properly granted summary judgment in favor of Wedgewood on its procedural due process claim, our holding is sufficient to affirm the district court's permanent injunction. Thus, we do not reach the district court's alternate holding that the WCCDP is unconstitutionally vague. *See United States v. Elkins*, 300 F.3d 638, 647 (6th Cir. 2002)

F.3d 665, 673 (6th Cir. 2007) ("[W]e may affirm on any grounds supported by the record even if different from the reasons of the district court.") (citation and internal quotation marks omitted). Further, we affirm the permanent injunction because Wedgewood suffered a constitutional violation and will continue to suffer irreparable injury for which there is not an adequate remedy at law, *Deja Vu of Nashville, Inc.*, 466 F.3d at 394, and that the scope of the district court's injunction does not constitute an abuse of discretion, *Gibson Guitar Corp.*, 423 F.3d at 546.[10]

r these reasons, we affirm the district court's order granting a permanent injunction against the Township.

("Courts should avoid [deciding] unnecessary constitutional questions." (citing *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

[10] We reserve judgment regarding whether the Township may re-enact the Instructions or their equivalent if it affords Wedgewood adequate notice and a hearing.

DISSENT

JAMES G. CARR, District Judge, dissenting. Because my understanding of the law controlling an aspect of the case before us differs from that of the majority, I respectfully dissent.

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV, § 1. To establish a procedural due process violation under 42 U.S.C. § 1983, Wedgewood must show that "'(1) [it] had a life, liberty, or property interest protected by the Due Process Clause; (2) it was deprived of this protected interest; and (3) the state did not afford [it] adequate procedural rights prior to depriving [it] of the property interest.'" *Waeschle v. Dragovic*, 576 F.3d 539, 544 (6th Cir. 2009) (quoting *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006)); *see also Med. Corp. v. City of Lima*, 296 F.3d 404, 409 (6th Cir. 2002).

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

In sum, "a party cannot possess a property interest in the receipt of a benefit when the state's decision to withhold the benefit is wholly discretionary." *Med. Corp.*, 296 F.3d at 409. To assert a property interest,

a party must point to a "policy, law, or mutually explicit understanding that both confers the benefit and limits the discretion of the City to the rescind the benefit." *Id.* at 410.

"Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577.

In Ohio, a property owner's right to an existing zoning classification vests "upon the filing of the application for the [building or zoning] permit." *Gibson v. City of Oberlin*, 167 N.E.2d 651, 654 (Ohio 1960); *Zaremba Dev. Co. v. City of Fairview Park*, 616 N.E.2d 569, 571 (Ohio Ct. App. 1992).

Wedgewood did not have an application for a zoning permit or certificate pending at the time the Trustees enacted the Instructions. The Commission denied Wedgewood's variance application and Wedgewood subsequently withdrew it prior to the Trustees' enactment of the Instructions.

The parties do not dispute that Wedgewood submitted its second application for a certificate on June 29, 2004, after the Trustees enacted the Instructions.

Because Wedgewood did not have an application pending at the time of the amendment, it did not, under *Gibson* and *Zaremba*, have a vested property

interest in the zoning classification of the parcel at issue.

I understand the majority opinion to hold that Articles XIV § 14.06 (F) and XXVII of the Liberty Township Zoning Resolution, Ohio Rev. Code § 519.12, and the WCCDP itself, with the accompanying notice and hearing requirements, create a property interest in the zoning classification. This is so, the majority indicates, because the procedural requirements which the corresponding legislative bodies prescribe serve as a "limit on discretion" sufficient to create procedural due process rights and, *ergo*, a property interest results.

Limits on discretion create property interests, according to my understanding, only when those limits are substantive. *Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 520 (6th Cir. 2007) ("state procedural requirements cannot be the types of "limits on discretion" that are sufficient to find a property interest. In order for limits on discretion to create property interests, they must be *substantive* limits on discretion.") (emphasis in original). State procedural requirements are not sufficient. *Id.*; *see also Ziegler v. Aukerman*, 512 F.3d 777, 787 (6th Cir. 2008) (holding that failure to provide a procedure required by state law does not inherently amount to a federal due process violation); *Brown v. City of Ecorse*, 322 F. App'x 443, 446 n.7 (6th Cir. 2009) (unpublished disposition) ("[Plaintiff] could not bootstrap himself into Fourteenth Amendment protection by claiming a property interest in certain procedures that he charges were not followed by [defendant].").

The fact that the state provides procedural rights, such as notice and a hearing, to protect substantive rights does not change this fact. *Experimental Holdings*, 503 F.3d at 520. For example:

> There would be a substantive limit on discretion if, for instance, a state could not refuse to renew a certain occupational license unless the licensee overcharged customers. The fact that the state gives the licensee certain procedural rights in determining the substantive right (e.g., an oral hearing, appointed counsel, or two administrative appeals) does not turn those procedural rights into federal due process rights. Nor could it, without simply rendering state procedural law enforceable in federal court.

Id.

In the district court case relied on by the majority, *Stile v. Copley Twp.*, 115 F. Supp. 2d 854, 865 (N.D. Ohio 2000), the court held that a zoning commission's amendment of the zoning code violated due process because the township had not provided adequate notice and hearing procedures. *Id.*

In a footnote – and in response to defendants' argument that plaintiff's rights had not vested under *Zaremba* because he had not "compl[ied] with all the legislative requirements for the procurement of a [zoning certificate]" – the court in *Stile* found "the argument of defendants to be no more than a red herring." *Id.* at 865 n.21. The court stated "here, the issue is whether the Zoning Commission had the

authority under Ohio law to take the action that it did." *Id.*[1]

The majority relies on the court's statement as support for its contention that a property right exists in the instant case. The majority also states that in *SuperValu Holdings, Inc. v. Jackson Ctr. Assoc., LP.*, 2006 WL 1843588, at *8 (Ohio Ct. App.), the Ohio Court of Appeals confirmed the property interest found by the court in *Stile*. For three reasons, I do not believe that *Stile* and *SuperValu* support the outcome reached by the majority.

First, the plaintiff in *Stile* had an application pending for a zoning certificate when the Zoning Commission amended the development plan. In fact, the court in *Stile* stated: "Under Ohio law, a property owner's right to an existing zoning classification vests upon the submission of an application for a building or zoning certificate." 115 F. Supp. 2d. at 865 n.21 (citing *Zaremba*, 616 N.E.2d at 571). This fact distinguishes the circumstances in *Stile* from those here, where

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[1] I note parenthetically that immediately preceding the quote on which the majority relies, the court in *Stile* also stated in response to defendants' argument:

> However, the Township Zoning Regulations also require action on an application within 30 days. The township has offered no explanation as to why the Zoning Inspector chose to sit on the application rather than extending the applicant the courtesy of a telephone call to tell him that his application was not in compliance with the regulations.

115 F. Supp. 2d at 865 n.21 (internal quotation omitted).

Wedgewood had no application pending when the Trustees changed the rules.

That the court in *Stile* then discounted defendants' argument that plaintiff's property right "did not vest under *Zaremba* because he did not comply with all the legislative requirements for the procurement of a zoning certificate," *id.*, is inapposite here. The district court's citation of *Zaremba* shows it was not disregarding the application requirement of *Zaremba*, even assuming it could have done so.

Most simply put, the landowner in *Stile* was not, as Wedgewood does here, asserting it had a property right, *absent a pending application for a building or zoning certificate*, when the change in zoning occurred.

Second, though I agree with the majority that the Ohio Court of Appeals recognized the holding of *Stile* in *SuperValu Holdings*, I disagree with the majority's interpretation of this recognition.

The Ohio Court of Appeals simply distinguished *Stile*, stating:

> The principal case cited by appellant, *Stile*, is inapplicable. In *Stile*, a township zoning commission eliminated a "permitted use" in a Planned Development District where the plaintiff owned property. The plaintiff had intended to sell part of his property to an automobile dealership, but such a sale was not feasible following the elimination of "community/regional sales" as a "permitted use." In *Stile*, state action affected the plaintiff's property rights by restricting how the plaintiff

> could use his property. In this case, Union Township's enactment of its zoning amendments did not affect Supervalu's property rights. Specifically, the enactment of the amendments did not affect the validity or the enforceability of the restrictive covenants.

SuperValu Holdings, 2006 WL 1843588, at *4.

Although the court in *SuperValu* recognized, in passing, the property right identified in *Stile*, it did not mention *Zaremba*, or *Gibson*. Had the court in *SuperValu* interpreted *Stile* as broadly as the majority seems to envision – as overruling or distinguishing the *Zaremba / Gibson* requirement that property rights vest only on submission of an application for a zoning permit or certificate – one would expect at least a passing reference to these cases. This is particularly true with regard to *Gibson*, as it is an Ohio Supreme Court case and binding authority.

Third, and most importantly, were the decision of the district court in *Stile* as broad as the majority suggests, that holding would contradict binding Sixth Circuit law, as exemplified by and enunciated so clearly in *Experimental Holdings*, 503 F.3d at 520. To repeat what that court stated and so clearly, emphatically and unequivocally declared: "state procedural requirements cannot be the types of 'limits on discretion' that are sufficient to find a property interest. In order for limits on discretion to create property interests, they must be *substantive* limits on discretion."

So established and stated, this rule draws the proverbial bright line for all – landowners, developers and governmental bodies.

Because Wedgewood had no application pending at the time of the amendment, and because procedural limits on discretion cannot, under the law of Ohio and precedents of this Court, create a property interest, Wedgewood did not have a vested property interest in any particular zoning classification. It, therefore, cannot establish a due process violation.

For these reasons, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Case No. C2-04-1069
JUDGE ALGENON L. MARBLEY
Magistrate Judge King

[Filed September 25, 2008]

WEDGEWOOD LIMITED PARTNERSHIP I,	)
Plaintiff,	)
v.	)
TOWNSHIP OF LIBERTY, OHIO, *et. al.*,	)
Defendants.	)

OPINION AND ORDER

I. INTRODUCTION

This matter comes before the Court on cross-motions for summary judgment by Plaintiff Wedgewood Limited Partnership I ("Wedgewood LP" or "Plaintiff"), and Defendants Holly C. Foust, Robert E. Cape, Peggy Guzzo, and Curt Sybert (collectively,

"Trustees"), the Township of Liberty, Ohio, located in Delaware County, Ohio ("Liberty Township"), and the Board of Trustees of Liberty Township ("Board of Trustees") (collectively, "Defendants"). For the reasons that follow, the Court **GRANTS** summary judgment in favor of Plaintiff on its procedural due process (Counts II & VI) and vagueness (Count III & VII) claims, and **GRANTS** in part and **DENIES** in part Plaintiff's request for declaratory relief (Count IX). Accordingly, Defendants' motion for summary judgment as to Counts II, III, VI, and VII is **DENIED**, and Defendants' motion is **GRANTED** in part and **DENIED** in part as to Count IX.

II. STATEMENT OF FACTS[1]

A. Background

The parties' dispute centers on the Defendants' decision to deny zoning approval for Plaintiff's proposed plan to develop a Wal-Mart Supercenter within Liberty Township. Defendants assert that they refused to issue Plaintiff a zoning permit to build the proposed Wal-Mart because the store would not comply with Liberty Township's Zoning Resolution. Plaintiff claims, however, that Defendants' decision to deny the requested zoning permit violated its due process rights and that the Zoning Resolution is an unconstitutionally vague ordinance.

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[1] The statement of facts is adopted, in part, from the Court's October 12, 2006 Order, addressing Defendants' motions to dismiss.

1. The Parties

Plaintiff owns an approximately 34-acre lot located in the "Wedgewood Commerce Center" development (the "WCC"), a 345-acre mixed-use development within Liberty Township. The lot, which is the subject of the instant suit, was platted as lot number 2069 or "subarea 3" in the WCC Section 1 and recorded as such in the Delaware County records. In addition to owning lot number 2069, Wedgewood LP was also one of the original developers of the WCC. Defendants are Liberty Township, the Board of Trustees, and the individual board members in their capacity as Trustees. Also, the Liberty Township/Powell Neighborhood Community Watch Foundation has intervened as a party defendant in the suit.

2. The WCC Development

In June 1991, Plaintiff and others filed an application to amend Zoning Map to Planned Commercial ("PC") to create the WCC, a proposed planned-unit development ("PUD"). On November 18, 1991, the Board of Trustees approved the re-zoning and the parties developed a planned-unit development plan (the "PUD Plan").[2] The PUD Plan, and all

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[2] In *Gray v. Trustees of Monclova Twp.*, 313 N.E.2d 366 (Ohio 1974), the Ohio Supreme Court addressed the nature of planned-unit development ("PUD") zoning, explaining that PUD zoning permits those aspects of land development that were normally regulated by zoning to vary within a geographically-defined area by bearing a single zoning classification. The *Gray* court noted that, "[t]he overall zoning classification in a PUD area can be termed 'nominal' because it does not, by itself, indicate the specific zoning restrictions in the area. These restrictions are

corresponding plat maps were formally combined into the "Wedgewood Commerce Center Development Standards" ("WCC Development Standards"), which was filed with the Commission on February 2, 1992. Among other things, the WCC Development Standards required the establishment of an "architectural review committee" to "exercise control over the design and final planning of all phases of the development" and to ensure that the proposed structures fit the "rural context of Liberty Township." Further, the WCC Development Standards provided that development would occur in five-year phases and would "proceed as market conditions dictate," estimating that it would take approximately ten to twelve years to finish the project.

Pursuant to the PUD Plan, there were seventeen subareas created with three different types of designated use: commercial, residential, and office. Subareas 3, 8, and 9 were the only subareas zoned for commercial use. Each was allotted a different amount of square feet for commercial use, and when added together, they totaled 499,930 square feet of permitted commercial use within the overall PUD Plan.[3] According to the Liberty Township Zoning Resolution, in place at that time, in a Liberty Township PC zone, the developer gets to "craft its own unique zoning that

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ascertainable only by referring to the approved plats for the development." *Id.* at 369. Accordingly, the *Gray* court found that the approval of a PUD plat is the functional equivalent of "traditional legislative zoning." *Id.*

[3] Subarea 3 was allotted +/- 220,857 square feet; subarea 8 was allotted +/- 144,553 square feet; and subarea 9 was allotted +/- 134,520 square feet.

applies only to that developer's parcel." *See* Zoning Resolution §§ 14.01, 14.06(a)-(c) (eff. May 1, 1991). To allow for this "unique zoning," each developer's plan becomes part of an amendment to the Township's zoning code. *See id.* §§ 14.06(d) ("The Development Plan as approved by the Township Trustees shall *constitute an amendment to the zoning resolution as it applies to the lands included in the approved amendment*.") (emphasis added).

Over the course of the next thirteen years, in accordance with standard Liberty Township zoning procedure,[4] significant development occurred within the WCC. Some of this development differed from what was set forth in the PUD Plan. For instance, although the PUD Plan designated subareas 4, 5, 6, and 10 for "suburban office use" only, owners of each of these subareas sought approval for and were granted permits to build retail and/or commercial structures. Accordingly, subareas 4, 5, 6, and 10 now comprise approximately 248,000 square feet of "commercial" development, rather than the suburban office space for which they were initially zoned. Plaintiff asserts that it had no involvement or input in Liberty Township's approval of these zoning changes.

In October 2003, Plaintiff submitted an application to the Commission for six area variances, to construct a Wal-Mart Supercenter on WCC lot number 2069. The parties do not dispute that the proposed Wal-Mart

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[4] Parties seeking to construct buildings on property within Liberty Township must first apply for a "Zoning Certificate" from the Zoning Inspector, who must then certify that the proposed construction is consistent with Liberty Township's Zoning Resolution.

store complies with the definition of "commercial" use under the Liberty Township Zoning Resolution. After conducting a public hearing on the matter, however, the Commission denied Plaintiff's variance applications, and Plaintiff subsequently withdrew them.

Soon after Plaintiff's variance applications were denied, the Homeowners Associations of Wedgewood, Camden Lakes, Wedgewood Hills, Falcon Ridge, Braemar, the Barringtons at Wedgewood Villa Condominium Association, Big Bear Farms, and Grandshire,[5] detailed their concerns over what they deemed inconsistencies in the PUD Plan. The Board of Trustees then ordered the Zoning Inspector, Holly Foust, to study the history of the administration of the PUD Plan to alleviate a number of concerns over its application.

On January 19, 2004, following the Zoning Inspector's study, the Trustees issued a Public Statement (the "January 19 Instructions"), which now governs the procedural administration of the WCC by the Commission. Importantly, the January 19 Instructions concluded that the PUD Plan imposed a so-called "floating cap" of 500,000 square feet of commercial property (the "floating cap") on all development within the WCC. Accordingly, the Board of Trustees instructed the Zoning Inspector to refrain from issuing any Zoning Certificates for additional commercial development that would surpass the 500,000 square foot floating cap within the WCC,

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[5] These groups later formed the Liberty Township/Powell Neighborhood Community Watch Foundation.

unless or until the PUD Plan had been modified or amended pursuant to procedures for modifications set forth in the Liberty Township Zoning Resolution. The Board of Trustees further indicated that any future applications for commercial development would be subject to a "two-step major deviation" development Plan modification.[6]

Plaintiff did not submit Zoning Applications under this heightened "major modification" process. Instead, on June 29, 2004, Plaintiff, using standard Liberty Township procedure, applied for zoning permits to build an approximately 220,598 square foot Wal-Mart Supercenter and a Murphy Oil gas station in subarea 3. On September 30, 2004, the Zoning Inspector denied Wedgewood LP's permit applications explaining that, in light of the January 19 Instructions, the applications: (1) failed to meet the requirements for development plans; (2) exceeded the acreage allowed

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[6] The Board of Trustees wrote:

> the commercial development completed to date, and substantially through the approval process, has consumed most of the commercial footage imposed by the development Plan as an overall cap. . . . Under these circumstances, we have determined that, except for a few modest projects which have already completed the two-step "major" administrative review process, *all additional applicants seeking to construct retail or other arguable "commercial" development in the [WCC] will be required to seek approval as a "major" plan of modification.*

The two-step approval process includes: (1) a review by the Commission or the Liberty Township Board of Zoning Appeals; and (2) a review by the Board of Trustees. *See* Zoning Resolution § 14.06(E) (eff. Oct. 3, 2002).

under the floating cap; (3) were incomplete because they had neither been submitted for approval nor approved by the WCC architectural review committee; and (4) were inconsistent with both the Zoning Resolution and the PUD Plan.

On October 20, 2004, Plaintiff appealed the Zoning Inspector's denial to the Liberty Township Board of Zoning Appeals ("BZA"). At the same time, Plaintiff also submitted a revised site plan and a letter withdrawing its permit application for the Murphy Oil gas station. In its appeal, Plaintiff stated that the Zoning Inspector had acted improperly in finding that the proposed construction would exceed the maximum square footage limitations because the January 19 Instructions, which served as the basis for the Inspector's decision, were inaccurate. Further, Plaintiff asserted that the Zoning Inspector had incorrectly stated that she could not issue a Zoning Certificate without the architectural review committee's approval as such approval had not been required in the thirteen years since the PUD Plan had been approved. Finally, Plaintiff argued that the Zoning Inspector had mistakenly deemed its applications incomplete for allegedly failing to meet variance requests.

The parties currently dispute multiple details of the PUD Plan. Defendants contend that prior to the Board of Trustees' final approval of the PUD Plan, the Trustees held a public hearing on November 11, 1991, where it was decided that the WCC would be limited to the density of one million square feet of office space, 500,000 square feet of retail space, and 750 residential units. Further, Defendants assert that on November 15, 1991, an amendment was made to the PUD Plan

that commercial construction could not exceed 500,000 square feet; and that an addendum ("Addendum A") was attached to the official filing of the PUD Plan in February 1992, which also set forth the 500,000 square-foot cap on commercial development. As support for their contention, Defendants cite to the minutes from the Commission's October 1991 and November 1991 meetings. Plaintiff counters that the parties never agreed to set a floating cap on commercial development, but rather that the documentation citing 500,000 square feet of commercial development simply offer summations of the commercial use designated for subareas 3, 8, and 9. Moreover, though Plaintiff concedes that it agreed to the establishment of a WCC architectural review committee, it contends that the committee has never met, and the Commission has never before required the committee's pre-approval of a party's zoning permit application.

B. Procedural History

Because Plaintiff has filed the instant federal court action in addition to filing a later suit in state court, a discussion of the procedural history of both the federal and state court proceedings is necessary.

1. State Court Proceedings

On November 5, 2004, before the BZA had ruled on Plaintiff's appeal, Plaintiff filed the instant suit claiming that Defendants' reliance on the January 19 Instructions, Defendants' modification of the Zoning Resolution, and Defendants' denial of Plaintiff's Wal-Mart zoning permit application violated Plaintiff's constitutional rights. After Plaintiff filed this action,

however, administrative activity regarding Plaintiff's denied zoning permit continued in Liberty Township.

On November 16, 2004, the Liberty Township BZA onducted a public hearing on Plaintiff's appeal of the Zoning Inspector's decision. Although Plaintiff did not present any testimonial evidence at the hearing, it did present arguments concerning the content and meaning of its plans, the development of the surrounding parcels, and a history of the WCC. On January 11, 2005, the BZA affirmed the Zoning Inspector's September 30 denial of Plaintiff's permit applications. *See* BZA Findings of Fact and Conclusions of Law. Thereafter, on February 8, 2005, Wedgewood LP filed its Notice of Appeal from the BZA's final decision in state court, pursuant to Ohio Revised Code § 2506.01.

On March 28, 2005, Plaintiff filed a motion to supplement the record with additional evidence and to stay the briefing of the case pending a decision on this motion. Plaintiff contended that the Board of Trustees' directive that they must approve, after public hearing, all commercial development in WCC was "improper and illegal." Plaintiff also asserted that the use of subarea 3 to build an approximately 220,000 square-foot Wal-Mart store is not a deviation from the PUD Plan because in 1991, Plaintiff was originally allotted up to 220,857 square feet for commercial development. Further, Plaintiff claimed that it was not bound by the floating cap because no such cap had been set forth in the WCC Development Standards, and because it had never agreed to allot a significant percentage of the purported floating cap to the developers of subareas 4, 5, 6, and 10, who were permitted to construct commercial buildings in place of the office space set

forth in the PUD Plan. On or about May 13, 2005, the state court denied Plaintiff's Motion to Supplement the Record, explaining that in failing to address its questions and concerns regarding certain documents and procedures during the BZA hearing, Plaintiff had effectively waived its right to supplement the record in the trial court.

On July 18, 2005, the parties participated in a hearing before the Court of Common Pleas for Delaware County, Ohio, addressing only two narrow issues: (1) the legal basis for the floating cap on commercial development in the WCC development; and (2) whether the PUD Plan had expired by the time Plaintiff had submitted its Wal-Mart zoning permit application. The state court noted that there was a dearth of evidence on both of the issues in question, explaining:

> In this case, vital information is missing from the Liberty Township Board of Zoning Appeals ("BZA") record that was submitted to this Court. Scarce, if any, testimony or exhibits were contained within the record that resolved questions pertaining to the basis of the zoning inspector's decision to deny Wedgewood's application for a zoning certificate. Further, the record was also devoid of evidence as to the legal basis of the 500,000 square-foot commercial limit imposed upon the WCC; and evidence as to the affect of the originally approved [Development P]lan for the WCC on the commercial limit.

See Wedgewood Ltd. P'ship I v. Liberty Twp. Bd. of Zoning Appeals, Case No. 05CV-F-02-101, Decision

and Entry at 3 (Ohio Ct. Com. Pl.'s Sept. 22, 2005) (Whitney, J.). Accordingly, the state court remanded the matter to the Liberty Township BZA to "carry out its role as the finder of fact to determine the basis of the zoning inspector's decision, as well as provide documentation for the 500,000 square-foot commercial limit [(the floating cap)] on the [WCC] Development and the affect of the original [PUD] Plan." *Id.* Plaintiff appealed the Court of Common Pleas' remand order to the Ohio Fifth District Court of Appeals, which held that it lacked subject matter jurisdiction to consider Plaintiff's appeal because the remand did not constitute a final appealable order. Meanwhile, the record currently before this Court reflects that the BZA deliberations are still being conducted.

2. Federal Court Proceedings

On November 5, 2004, Plaintiff filed this action in this Court asserting its constitutional rights had been violated. Plaintiff's federal court Complaint asserts nine Counts against Defendants. On October 12, 2006, this Court granted in part and denied in part Defendants' Rule 12(b)(6) motion to dismiss all Counts. The Court refused to dismiss Counts Two, Three, and Nine. Specifically, the Court determined that Plaintiff's procedural due process and void for vagueness claims, under both the federal and Ohio constitutions, stated claims upon which relief could be granted. The Court also denied Defendants' motion to dismiss Plaintiff's declaratory relief claim, withholding judgment pending the resolution of Plaintiff's viable constitutional claims.

III. STANDARD OF REVIEW

Summary judgment is appropriate where the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant has the burden of proving the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether the movant has carried its burden, the Court views the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

The standard of review for cross-motions of summary judgment does not differ from the standard applied when a motion is filed by only one party to the litigation. *Taft Broad. Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991). And "[t]he fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts. Rather, the court must evaluate each party's motion on its own merits. . . ." *Id.* (citations omitted).

IV. LAW AND ARGUMENT

A. Due Process

1. Plaintiff's Liberty Interests

A Plaintiff can make a procedural due process claim through one of two methods: "(1) [by] demonstrating that [he] is deprived of property as a result of [an] established state procedure that itself violates due process rights; or (2) by proving that [d]efendants deprived [him] of property pursuant to a 'random and unauthorized act' and that available state remedies would not adequately compensate for the loss." *Macene v. MJW, Inc.*, 951 F.2d 700, 706 (6th Cir. 1991). An established state procedure refers to "the mechanism that effects a deprivation or contributes to cause a deprivation." *See Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 199 (6th Cir. 1987). Under the first-prong of *Macene*, a plaintiff is not required to demonstrate the inadequacy of state remedies. *Moore v. Bd. of Educ. of Johnson City Sch.*, 134 F.3d 781, 785 (6th Cir.1998).

In its October 12, 2006 Order, this Court found that the January 19 Instructions are administrative in nature, as opposed to legislative, and are therefore subject to procedural due process requirements. *Wedgewwod Ltd. P'ship I. v. Twp. of Liberty, Ohio*, 456 F. Supp. 2d 904, 935 (S.D. Ohio 2006); *see also, Pickney Bros., Inc. v. Robinson*, No. 98-5097, 1999 WL 801513, at *4 (6th Cir. Sept. 30, 1999) ("Governmental determinations of a general nature that affect all equally do not give rise to a due process right to be heard. But, when a relatively small number of persons are affected on individual grounds, the right to a

hearing is triggered."). This Court then went on to find that Plaintiff has a valid liberty interest in the PUD Plan,[7] and a legitimate procedural due process claim under the first prong of the *Macene* test. *Id.* at 936.[8] The question presently before the Court is whether, under a summary judgment standard of review, the January 19 Instructions constitute an established state procedure that deprive the Plaintiff of its liberty interests, and if so, whether that deprivation contravened notions of due process. Both parties agree that interpreting the PUD Plan's meaning is a matter of law. *See State v. Wood*, 137 Ohio App. 3d 623, 625 (2000).[9]

Plaintiff argues that the January 19 Instructions are an established state procedure that deprive it of its liberty interests in the PUD Plan because the Instructions modify the terms of the Plan. Specifically, Plaintiff argues that the January 19 Instructions instituted a previously non-existent floating cap on commercial development that covers the entire PUD Plan, whereas the original PUD Plan only considered

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[7] Defendants spent considerable effort arguing against the validity of Plaintiff's liberty interest in the PUD Plan, but ignored the fact that this Court already ruled on the issue as a matter of law. There is no basis for the Court's legal ruling on the 12(b)(6) motion to be relitigated upon the filing of motions for summary judgment.

[8] Because the Court found merit in Plaintiff's claim of a procedural due process under the first-prong of *Macene*, it did not reach Plaintiff's second-prong claim.

[9] Because there is no federal law of zoning, federal courts rely on state court interpretations for guidance. *See, e.g., League to Save Lake Tahoe v. Crystal Enterprises*, 685 F.2d 1142, 1144 (9th Cir. 1982).

commercial development in three subareas and accordingly the commercial development limitations were only applicable to those areas. Also, Plaintiff argues that the January 19 Instructions introduced the requirement that *all* subsequent commercial development in the WCC must go through the two-step major modification process, whereas the original PUD Plan only required the two-step process for projects that would constitute a "major deviation" from the Plan.

In support, Plaintiff relies on *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 896 (6th Cir. 1991) to argue that when the government amends a zoning plan in a way that is going to target a small number of persons on individual grounds, due process rights to notice and a hearing are implicated. The court in *Nasierowski* held that a landowner's due process rights were violated when his land was re-zoned without prior notice or a hearing concerning the type of re-zoning that took place. *Id.* Plaintiff argues that their case is analogous because the January 19 Instructions effectively amended the PUD Plan without regard to established procedures set forth by Ohio law and the Liberty Township Zoning Code,[10] and without notice or hearing.

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[10] Ohio Rev. Code Ann. § 519.12 governs amendments to township zoning regulations and requires that before amendments can take effect there must be a public hearing before the zoning commission and the board of trustees, among other procedural requirements.

Article XXVII of the Liberty Township Zoning Resolution contains many of the procedural requirements found in Ohio Rev. Code Ann. § 519.12

Defendants retort that the 500,000 square-foot floating cap and the major modification procedure both existed before the creation of the January 19 Instructions. Concerning the 500,000 square-foot floating cap, Defendants cite to Addendum A and the November 15, 1991 amendments to the PUD Plan. Defendants note that these documents articulate the 500,000 square-foot limitation, using descriptions like "Total Land Use [for commercial development]" and "[g]ross square footage of commercial construction shall not exceed Five Hundred Thousand (500,000) square feet." Defendants argue that if these descriptions were intended to be mere summations of subareas 3, 8, and 9, they would have explicitly stated as much. Further, with respect to the major modification procedure, Defendants argue that it was incorporated in to Section 14.06(E) of the Liberty Township Zoning Resolution in 1996 and had been applied to multiple developers prior to the creation of the January 19 Instructions. Thus, Defendants assert that this case is distinguishable from *Nasierowski* because the January 19 Instructions were only instructions on how to interpret the PUD Plan, not an amendment to the Plan as was the case in *Nasierowski*.

Defendants also contend that Plaintiff is quasi-estopped from arguing that commercial development in subareas not originally designated for commercial development does not count toward the 500,000 square-foot floating cap because Plaintiff knew of that development and did not object. Defendants argue that the doctrine of quasi-estoppel prevents Plaintiff from accepting "the benefits of legislation [here, the PUD Plan] and then challeng[ing] the burdens which the legislation imposes." *Fairland v. Fraley*, No. 9827,

1981 Ohio App. LEXIS 13742, at *8 (9th Dist. Feb. 11, 1981). Here, the allegation is that Plaintiff knew of the 500,000 square-foot limitation, developed commercial businesses in areas not originally designated as commercial, and now wants to exceed the 500,000 square-foot limitation by relying on the PUD Plan's originally conceived commercial allowance for subarea 3.

The Court finds, as a matter of law, that the January 19 Instructions amended the PUD Plan. Addressing the 500,000 square-foot floating cap first, the Court has two possible interpretations of the PUD Plan: (1) the 500,000 square-foot limitation discussed in the November 15 amendments and Addendum A was meant to work in conjunction with the individual allowances for commercial development in subareas 3, 8, and 9 (which coincidentally happened to total approximately 500,000 square feet); or (2) the discussion of 500,000 square feet in the PUD Plan is solely a summation of the allowable commercial development in the three subareas approved for commercial use.

Ohio law requires deference toward the property owner when interpreting zoning plans. *B.P. Oil Co. v. Dayton Bd. Of Zoning Appeals*, 672 N.E. 2d 256, 261 (Ohio App. 2 Dist., 1996) ("Ohio law is clear that in interpreting a zoning ordinance courts must strictly construe restrictions on the use of real property in favor of the property owner.). No such deference is needed here. Defendants' interpretation of the PUD Plan simply makes less sense than that of Plaintiff. If the 500,000 square feet of commercial development described in the November 15 amendments and Addendum A was meant to be independent from the

limitations described in each individual subarea, it would render the commercial designations of subareas 3, 8, and 9 meaningless. There would be no point in having a commercial development limitation that applied to all seventeen subareas if commercial development was only intended to be permissible in three of those subareas. Instead, Plaintiff's interpretation of the PUD Plan is much more reasonable. The PUD Plan's description that commercial development "shall not exceed" 500,000 square feet is consistent with the limitations placed on subareas 3, 8, and 9, which total approximately 500,000 square feet. Thus, reading it as a summation of the maximum allowable commercial development in those three subareas is most logical. The fact that *both* parties were willing to turn a blind-eye toward the location requirements for commercial development expressed in the PUD Plan for thirteen years does not somehow change the maximum allowable commercial development in subareas 3, 8, or 9. Nowhere in the PUD Plan is any such "floating cap" condition mentioned.[11]

The January 19 Instructions also made the two-step major modification procedure applicable to *all* future commercial development, not just to commercial development that constituted a major deviation from the PUD Plan. Whether Plaintiff's proposed development would have been subject to the procedure is irrelevant. The fact that the requirements of the

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[11] Because the Court finds no existence of a floating cap on commercial development, the doctrine of quasi-estoppel is inapplicable. Plaintiff does not seek to avoid the responsibilities of legislation from which it receives benefit, therefore, it cannot be estopped from something that it is not doing.

PUD Plan were amended by the January 19 Instructions is sufficient to implicate Plaintiff's liberty interests.

This Court has already held, as a matter of law, that Plaintiff has a liberty interest in the procedures set forth under the PUD Plan, and the Court now finds that Defendants' January 19 Instructions represent an amendment to that Plan. The January 19 Instructions, therefore, constitute an established state procedure for due process analysis under *Macene* because they are the mechanism that effect the deprivation of Plaintiff's liberty interests. *See Vinson*, 820 F.2d at 199.

2. Provision of Due Process

As noted above, in *Nasierowski*, the Sixth Circuit held that where a landowner's liberty interests will be deprived by the passage of an amendment to a zoning ordinance, notice and an opportunity to be heard are constitutionally required. *Nasierowski Bros. Inv. Co.*, 949 F.2d at 896. The plaintiff in *Nasierowski* was not provided that opportunity to be heard, and thus the court ruled that he had been deprived of due process. Consistent with its holding in *Nasierowski*, the court in *Macene* held that the plaintiff was not deprived of due process because he had ample notice and opportunity to be heard under the procedures set forth by Michigan law. *Macene*, 951 F.2d at 706.

Here, Plaintiff was not given notice or an opportunity to be heard concerning the amendments to the PUD Plan that took effect with the creation of the January 19 Instructions, nor were the procedures set forth in the Liberty Township Zoning Regulation or section 519.12 of the Ohio Revised Code followed. In its

Order denying Defendants' Rule 12(b)(6) motion to dismiss Plaintiff's procedural due process claim, the Court held:

> For thirteen years, the WCC PUD Plan had set subarea 3 as an approximately 220,000 square-foot commercial lot. After the January 19 Instructions were issued, however, the size of any potential development on that lot shrunk far below the originally allotted square footage. Defendants cannot unilaterally change the future of the WCC without providing the public with both notice and an opportunity to debate such a change.

Wedgewood Ltd. Partnership I v. Township of Liberty, Ohio, et. al., 456 F. Supp. 2d 904, 937 (S.D. Ohio 2006). The Court now finds that there are no genuine issues of material fact on this claim, and rules as a matter of law that Plaintiff was denied due process as guaranteed by the Fourteenth Amendment to the United States Constitution. Plaintiff's motion is hereby **GRANTED**, and Defendants' motion is **DENIED**.

B. Void-for-Vagueness Claim

"The void-for-vagueness doctrine' is embodied in the due process clauses of the fifth and fourteenth amendments." *D.C. and M.S. v. City of St. Louis, Mo.*, 795 F.2d 652, 653 (8th Cir. 1986). A vague regulation is constitutionally infirm in two significant respects. First, the doctrine of vagueness "incorporates notions of fair notice or warning," and a regulation "violates the first essential of due process of law" by failing to provide adequate notice of prohibited conduct. *See Smith v. Goguen*, 415 U.S. 566, 572 (1974); *Connally v.*

General Constr. Co., 269 U.S. 385, 391 (1926) (citations omitted). In short, a regulation is void-for-vagueness if it "forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Id.* Second, the void for vagueness doctrine prevents arbitrary and discriminatory enforcement. *Goguen*, 415 U.S. at 573. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application" *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Generally, courts have found that "[v]agueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand." *Nat'l Rifle Ass'n of Am. v.* Magaw, 132 F.3d 272, 292 (6th Cir. 1997) (citing *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)). In other words, the statute must be judged on an as-applied basis, and a facial challenge before the statute has been applied is premature. *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *United States v. Hofstatter*, 8 F.3d 316, 321 (6th Cir.1993).

Plaintiff brings an as-applied challenge, arguing that if the January 19 Instructions solely clarify the PUD Plan's requirements, and do not represent an amendment to the PUD Plan, then the PUD Plan is unconstitutionally vague. Plaintiff rests its claim on the assertion that the PUD Plan provides no notice of the obligations and restrictions that are spelled out by the January 19 Instructions.

Defendants focus their argument on the notion that it is reasonable to conclude that the 500,000 square-foot limitation and the two-step major modification were a part of the PUD Plan and Liberty Township Zoning Regulation before the creation of the January 19 Instructions. Defendants rely on the Supreme Court's instructions regarding statutory interpretation as set forth in *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001): "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems." Defendants also assert that for Plaintiff to succeed on its vagueness claim, it "must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 n.7 (1982) (internal citations omitted). Defendants argue that Plaintiff falls well short of demonstrating that it is impossible to interpret the PUD Plan as containing the requirements that were allegedly clarified in the January 19 Instructions.

The Court finds that the PUD Plan is unconstitutionally vague as applied to Plaintiff. Defendants' analysis of the vagueness doctrine is flawed insofar as it attempts to demonstrate the facial validity of the PUD Plan. Plaintiff has brought an as-applied challenge, which does not require analysis of whether the PUD Plan could have any possible valid interpretations. *See Mazurie*, 419 U.S. at 550. Instead, Plaintiff's claim requires the Court to determine whether Defendants' actual application of the PUD

Plan put Plaintiff on adequate notice of prohibited conduct. *See Goguen*, 415 U.S. at 572. Thus, the *St. Cyr* and *Hoffman* cases cited by Defendants are inapposite. Both of those cases address facial validity of legislation, not challenges to the application of legislation. As discussed in *supra* section IV(A)(1), there is nothing in the PUD Plan that would put Plaintiff on notice that commercial development outside of subareas 3, 8, and 9 would cause a corresponding decrease in the commercial development permitted within those three subareas—nor did Defendants' actions during the thirteen years following the passage of the PUD Plan give Plaintiff such notice. Further, there is nothing in the Liberty Township Zoning Regulation that would give a person of common intelligence notice that a two-step major procedure for *major deviations* from the PUD Plan would actually be applicable for *any* commercial development application, even those that did not propose a major deviation. Thus, the fact that the January 19 Instructions introduced these requirements and were relied upon by the Zoning Inspector for her denial of Plaintiff's application demonstrate that the PUD Plan is unconstitutionally vague as applied to Plaintiff, and as a result, Plaintiff suffered injury. The Court, therefore, **GRANTS** Plaintiff's motion and **DENIES** that of Defendants.

C. State Law Claims

In Counts Six and Seven of the Complaint, Plaintiff asserts due process and vagueness claims pursuant to Ohio law. These claims are governed by essentially the same standards as those applicable to Plaintiff's federal constitutional claims. *See Warren v. City of Athens, Ohio*, 411 F.3d 697, 704 n.6 (6th Cir. 2005)

(citing *Sorrell v. Thevenir*, 633 N.E.2d 504, 511-12 (Ohio 1994)). Accordingly, insofar as the Court **GRANTS** Plaintiff's federal law claims, Plaintiff's corresponding state law claims are also **GRANTED**.

D. Declaratory Relief

Although heavily briefed by the parties, Plaintiff's request for declaratory judgment stating that Plaintiff is entitled to the zoning permit it seeks has already been dismissed. *See Wedgewood Ltd. P'ship I*, 456 F. Supp.2d at 933 (holding that "[b]ecause Plaintiff has not established a legitimate claim of entitlement to a zoning permit, nor a justifiable expectation that the Zoning Inspector would issue the permit, it has no property interest that could support a substantive due process claim. . . . The Zoning Inspector denied Plaintiff's permit applications because Plaintiff failed to comply with a number of elements of the Liberty Township Zoning Resolution beyond the floating cap, and the record does *not* suggest that the denial was unwarranted."). Thus, Plaintiff's request for declaratory relief regarding the sufficiency of its zoning applications and entitlement to a zoning permit is **DENIED**.

However, in this Order, the Court has granted Plaintiff's procedural due process and vagueness claims with respect to the incorporation of the January 19 Instructions in to the PUD Plan. Accordingly, the Court **GRANTS** Plaintiff's request to enjoin the enforcement of the January 19 Instructions. In particular, it is ordered that Liberty Township may not

impose a 500,000 square-foot "floating cap" over the WCC PUD Plan.[12]

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** summary judgment in favor of Plaintiff on its procedural due process (Counts II & VI) and vagueness (Count III & VII) claims, and **GRANTS** in part and **DENIES** in part Plaintiff's request for declaratory relief (Count IX). Accordingly, Defendants' motion for summary judgment as to Counts II, III, VI, and VII is **DENIED**, and Defendants' motion is **GRANTED** in part and **DENIED** in part as to Count IX.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: September 26, 2008

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[12] Defendants also assert that Plaintiff's request for declaratory relief has been rendered moot by virtue of a newspaper article reporting that Wal-Mart terminated its real estate purchase agreement to buy WCC Lot 2069 from Plaintiff. *See* Wal-Mart Supercenter Now In Limbo; Retailer Halts Deal to Buy Liberty Township Site; *Columbus Dispatch*, p. B1 (Mar. 6, 2008). This argument lacks merit, however, because it is the Plaintiff who applied for the zoning permit, the Plaintiff who owns property in the PUD Plan, and the Plaintiff who has brought suit. The status of any contractual obligations between Wal-Mart and the Plaintiff is irrelevant to the issues before this Court.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Case No. C2-04-1069

[Filed October 12, 2006]

WEDGEWOOD LIMITED PARTNERSHIP I.,	)
Plaintiff,	)
v.	)
TOWNSHIP OF LIBERTY, OHIO, *et al.*,	)
Defendants.	)

OPINION AND ORDER

I. INTRODUCTION

This matter comes before the Court on the following motions: (1) Motion to Dismiss for Lack of Jurisdiction and/or Motion for Partial Judgment on the Pleadings by Defendants Holly C. Foust, Robert E. Cape, Kim Cellar, and John C. Werner (collectively, "Trustees"), the Township of Liberty, Ohio, located in

Delaware County, Ohio ("Liberty Township"), and the Board of Trustees of Liberty Township ("Board of Trustees") (collectively, "Defendants"); and (2) Motion to Dismiss for Lack of Jurisdiction and/or for Failure to State a Claim on Which Relief Can be Granted by Intervenor Liberty Township/Powell Neighborhood Community Watch Foundation ("Intervenor"). For the reasons set forth herein, Defendants' and Intervenor's Motions are **GRANTED** in part and **DENIED** in part.

II. STATEMENT OF FACTS[1]

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[1] Plaintiff asserts that the Defendants and Intervenor have "submitted to this Court what [are] essentially [motions] for summary judgment with hundreds of pages of attached exhibits. . . ." *See* Pls.' Response to Intervenor's Motion to Dismiss at 14. Plaintiff claims that because the attached exhibits include "matters outside the pleadings," the Court should treat the Motions at issue as motions for summary judgment. *See id.* at 14-16 (citing *Gilbert v. Joyce*, 129 F.3d 1263 (6th Cir. 1997) ("motion to dismiss is more properly construed as a motion for summary judgment because the district court considered matters outside the pleadings")). Defendants and Intervenor have attached identical Exhibits to their respective Motions. The Exhibits follow: (1) Exhibit A - Application for Zoning Permit Filed June 29, 2004 by Wedgewood LP; (2) Exhibit B - September 30, 2004 Decision Denying Application for Appeal filed by Wedgewood LP; (3) Exhibit C - October 20, 2004 Application for Appeal filed by Wedgewood LP; (4) Exhibit D – Liberty Township Zoning Resolution – Effective October 3, 2002; (5) Exhibit E – Liberty Township Zoning Resolution – Effective May 1, 1991; (6) Exhibit F - WCC Development Standards with Table of Contents; (7) Exhibit G – October 2, 1991 Liberty Township Trustee minutes; (8) Exhibit H – October 21, 1991 Liberty Township Trustee minutes; (9) Exhibit I November 11, 1991 – Liberty Township Trustee minutes; (10) Exhibit J – November 18, 1991 Liberty Township Trustee minutes; (11) Exhibit K – January 19 Instructions; (12) Exhibit L – Liberty Township Zoning Resolution, Article XIV – Effective December 8, 2004. Each of the

A. Background

The parties' dispute centers on the Defendants' decision to deny zoning approval for Plaintiff's proposed plan to develop a Wal-Mart Supercenter within Liberty Township. Defendants assert that they refused to issue Plaintiff a zoning permit to build the proposed Wal-Mart because the store would not comply with Liberty Township's Zoning Resolution. Plaintiff claims, however, that Defendants' decision to deny the requested zoning permit was arbitrary and capricious and violated its constitutional rights.

1. The Parties

Plaintiff, Wedgewood Limited Partnership I ("Wedgewood LP" or "Plaintiff"), owns an approximately 34-acre lot located in the "Wedgewood Commerce Center" development (the "WCC"), a 345-acre mixed-use development within Liberty Township. The lot, which is the subject of the instant suit, was platted as "lot number 2069" or "subarea 3" in the WCC Section 1 in 1994 and recorded as such in the Delaware County records. *See* Ex. F. In addition to owning lot number 2069, Wedgewood LP was also one

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aforementioned Exhibits constitutes a public record. Accordingly, the Court may take judicial notice of these documents without converting the Motions into motions for summary judgment. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) ("'[A]s a general rule, matters outside the pleadings may not be considered in ruling on a [Rule] 12(b)(6) motion to dismiss unless it is converted into one for summary judgment under [Rule 56].' There are, however, exceptions to this general rule. Courts may consider public records, matters of which a court may take judicial notice, and letter decisions of government agencies.").

of the original developers of the WCC. Defendants are Liberty Township, the Board of Trustees, and the individual board members in their capacity as Trustees.[2] Also, the Liberty Township/Powell Neighborhood Community Watch Foundation ("Intervenor") has intervened as a party defendant in the suit.

2. The WCC Development

In June 1991, Plaintiff and others filed an application for a Zoning Map amendment from FR-1 to Planned Commercial ("PC") to create the WCC, a proposed planned-unit development.[3] On November 18,

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[2] Though the Sixth Circuit does not require plaintiffs bringing section 1983 zoning claims to do so, Plaintiff named each individual member of the Board of Trustees in his official capacity as a Defendant. *But see, Leach v. Shelby County Sheriff*, 891 F.2d 1241 (6th Cir. 1989) (the Sixth Circuit does not require plaintiffs bringing Section 1983 zoning claim to name individual board members or trustees in their official capacities as defendants).

[3] Section 519.021 of the Ohio Revised Code applies to the adoption of PUD regulations by Ohio townships, providing, in relevant part:

> . . . Planned-unit developments may be included in the township zoning resolution under one of the following procedures.
>
> (A) The board of township trustees may adopt planned-unit development regulations that do not automatically apply to any property in the township, but establish standards that will apply to property that becomes part of the planned-unit development as provided in this division. Property owners who wish to have planned-unit development regulations apply to their property may apply to have the zoning map amended pursuant to section 519.12 of the Ohio Revised Code to rezone

their property as a planned-unit development, and no longer subject to the previously applicable zoning regulations. Once property has been rezoned as a planned-unit development, subsequent development on that property shall comply with the planned-unit development regulations as determined by the board of township trustees or township zoning commission, as applicable. After the designation of the property as a planned-unit development on the zoning map, any approval or disapproval of subsequent use or development of property in a planned-unit development as being in compliance with regulations established as authorized by this division shall not be considered to be an amendment or supplement to a township zoning resolution for the purpose of section 519.12 of the Revised Code, but may be appealed pursuant to Chapter 2506 of the Revised Code.

(B) Upon the application of property owners, the board of township trustees may establish a planned-unit development for their property, designating the property as a planned-unit development on the zoning map in accordance with the procedures set forth in section 519.12 of the Revised Code, and simultaneously adopting regulations as part of that same procedure that will apply only to that planned-unit development. Within that development, property is subject to the planned-unit development regulations and not to any other zoning regulations. Compliance with the planned-unit development regulations shall be determined by the board of township trustees or township zoning commission, as applicable. After the designation of the property as a planned-unit development on the zoning map and the simultaneous adoption of regulations that will apply only to that planned-unit development, any approval or disapproval of subsequent use or development of property in a planned-unit development as being in compliance with regulations established as authorized by this division shall not be considered to be an amendment or supplement to a township zoning resolution for the purposes of section 519.12 of the Revised Code, but may be appealed pursuant to Chapter 2506 of the Revised Code.

(C) Pursuant to section 519.12 of the Revised Code, the board

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of township trustees may adopt planned-unit development regulations and amend the zoning map to rezone property as planned-unit developments. Any other zoning regulations and zoning district that exist at the time a planned-unit development district is established under this division continue to apply within the planned-unit development district unless the board or the township zoning commission approves an application of an owner of property within the district to subject the owner's property to planned-unit development regulations under this division. Such an application shall be made in accordance with the planned-unit development regulations and shall include a development plan that complies with the planned unit development regulations. Upon receiving such an application, the board of township trustees or township zoning commission . . . shall determine whether the application and plan comply with the planned-unit development regulations. The board's or commission's determination shall not be considered to be an amendment to a township zoning resolution for purposes of section 519.12 of the Revised Code, but may be appealed pursuant to Chapter 2506 of the Revised Code. If the board or commission makes a final determination that the plan included in the application complies with the planned-unit development regulations or if the board's or commission's final determination is one of noncompliance then if a court of competent jurisdiction makes a final nonappealable order finding compliance, the board or commission, as applicable, shall approve the application and upon approval shall cause the zoning map to be changed so that any other zoning district that applied to the property that is the subject of the owner's application no longer applies to that property. The removal of the prior zoning district from the zoning map is a ministerial act and shall not be considered to be an amendment or supplement to a township zoning resolution for the purposes of section 519.12 of the Revised Code and may not be appealed pursuant to Chapter 2506 of the Revised Code. . .

As used in this section, "planned-unit development" means a development which is planned to integrate residential, commercial, industrial or any other use. . . .

1991, the Board of Trustees approved the re-zoning and the parties developed a planned-unit development plan (the "PUD Plan").[4, 5] The PUD Plan, and all corresponding plat maps were formally combined into the "Wedgewood Commerce Center Development Standards" ("WCC Development Standards"), which was filed with the Commission on February 2, 1992. *See* Ex. F. Among other things, the WCC Development Standards required the establishment of an "architectural review committee" to "exercise control over the design and final planning of all phases of the development" and to ensure that the proposed

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See OHIO REV. CODE § 519.021.

[4] Both the Delaware County Regional Planning Commission and the Liberty Township Zoning Commission (the "Commission") rejected developers' initial proposals regarding a WCC planned-unit development. After extensive negotiations between the developers and various Trustees, however, the Board of Trustees approved a revised version of the initial proposals – the PUD Plan. The parties dispute the details of the negotiations as well as various elements of the PUD Plan.

[5] In *Gray v. Trustees of Monclova Twp.*, 313 N.E.2d 366 (Ohio 1974), the Ohio Supreme Court addressed the nature of planned-unit development ("PUD") zoning, explaining that PUD zoning permits those aspects of land development that were normally regulated by zoning to vary within a geographically-defined area by bearing a single zoning classification. The *Gray* court noted that, "[t]he overall zoning classification in a PUD area can be termed 'nominal' because it does not, by itself, indicate the specific zoning restrictions in the area. These restrictions are ascertainable only by referring to the approved plats for the development." *Id.* at 369. Accordingly, the *Gray* court found that the approval of a PUD plat is the functional equivalent of "traditional legislative zoning." *Id.*

structures fit the "rural context of Liberty Township." *See* Ex. F ¶ 3. Further, the WCC Development Standards provided that development would occur in five-year phases and would "proceed as market conditions dictate," estimating that it would take approximately ten to twelve years to finish the project. *Id.* ¶¶ 7-8.

Pursuant to the PUD Plan, lot number 2069 was zoned "Planned Commercial"[6] ("PC"). According to the Liberty Township Zoning Resolution in place at that time, in a Liberty Township PC zone, the developer gets to "craft its own unique zoning that applies only to that developer's parcel." *See* Zoning Resolution §§ 14.01, 14.06(a)-(c) (eff. May 1, 1991).[7] To allow for this "unique zoning," each developer's PC plan becomes part of an amendment to the Township's

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[6] "Planned Commercial" zones are also referred to as "Planned Commercial and Office" zones. *See* Intrevenor's Motion at 8 (citing Foust Aff, at Tab G, "Oct. 2, 1991 Meeting Minutes").

[7] Section 14.01, "Planned Commercial and Office District – Purpose," provides:

> The Township, recognizing that with increased urbanization and population growth comes increased demands for well organized commercial areas to provide employment, goods and services to area residents as well as to provide a balanced economy within the township, hereby provides for the Planned Commercial and Office District, intending hereby to promote the variety and flexibility of land development for commercial purposes that are necessary to meet these demands while still preserving and enhancing the health, safety and general welfare of the inhabitants of the Township.

See Liberty Township Zoning Resolution § 14.01.

zoning code. *See id.* §§ 14.06(d) ("The Development Plan as approved by the Township Trustees shall *constitute an amendment to the zoning resolution as it applies to the lands included in the approved amendment.*") (emphasis added).

Over the course of the next thirteen years, in accordance with standard Liberty Township zoning procedure,[8] significant development occurred within the WCC. Some of this development differed from what was set forth in the PUD Plan. For instance, although the PUD Plan designated subareas 4, 5, 6, and 10 for "suburban office use" only, owners of each of these subareas sought approval for and were granted permits to build retail and/or commercial structures. Accordingly, subareas 4, 5, 6, and 10 now comprise approximately 248,000 square feet of "commercial" development, rather than the suburban office space for which they were initially zoned. Plaintiff asserts that it had no involvement or input in Liberty Township's approval of these zoning changes.

In October 2003, Plaintiff submitted an application to the Commission for six area variances, primarily from set-backs, to construct a Wal-Mart Supercenter on WCC lot number 2069. The parties do not dispute that the proposed Wal-Mart store complies with the definition of "commercial" use under the Liberty

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[8] Parties seeking to construct buildings on property within Liberty Township must first apply for a "Zoning Certificate" from the Zoning Inspector, who must then certify that the proposed construction is consistent with Liberty Township's Zoning Resolution.

Township Zoning Resolution.[9] After conducting a public hearing on the matter, however, the Commission denied Plaintiff's variance applications, and Plaintiff subsequently withdrew them.

Soon after Plaintiff's variance applications were denied, the Homeowners Associations of Wedgewood, Campden Lakes, Wedgewood Hills, Falcon Ridge, Braemar, the Barringtons at Wedgewood Villa Condominium Association, Big Bear Farms, and Grandshire,[10] detailed their concerns over what they deemed inconsistencies in the PUD Plan. The Board of Trustees then ordered the Zoning Inspector, Holly Foust, to "study" the history of the administration of the PUD Plan to alleviate a number of concerns over its application.

On January 19, 2004, following the Zoning Inspector's study, the Trustees issued a Public Statement (the "January 19 Instructions"), which now governs the procedural administration of the WCC by the Commission. Importantly, the January 19 Instructions concluded that the PUD Plan imposed a so-called "floating cap" of 500,000 square feet of commercial property (the "floating cap") on all

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[9] "Commercial use" includes "commercial and office establishments of all types developed and maintained within an organized development of associated commercial activities in accordance with the approved development plan." *See* Liberty Township Zoning Resolution § 14.03(a).

[10] These groups later formed the Liberty Township/Powell Neighborhood Community Watch Foundation.

development within the WCC.[11] Accordingly, the Board of Trustees instructed the Zoning Inspector to refrain from issuing any Zoning Certificates for additional commercial development within the WCC unless or until the PUD Plan had been modified or amended

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[11] The January 19 Instructions provide:

> Extensive review and analysis of the [WCC] development plan, the minutes of the meetings which led to the approval of that plan, the policies that have been followed to date in administering that plan, and the discernable intent of all the parties expressed during the conception and the process which led to the approval of the plan, has led us to conclude that the ultimately adopted plan imposed a "floating" maximum of 500,000 sq. ft. of "commercial" development in the [WCC]. We have found evidence of the establishment of this limit in a number of different documents. Moreover, we have found no documents or proof through amendment processes which modified this "overall" square footage cap, as best we can conclude. The subject of whether or not an acreage "cap" also applies has been more difficult. On the one hand, the documents clearly show that such a cap was contemplated and negotiated., and is reflected in several different drawings, text, and supporting documents. Unfortunately, however, the documents that exist are at least arguably inconsistent with respect to the starting point of the cap and acreage basis. Moreover, amendments and changes requested and, in some cases, approved over the years, may or may not have had the impact of suggesting or modifying the acreage cap. . . .
>
> The analysis reveals that the commercial development completed to date, and substantially through the approval process, has consumed most of the commercial square footages imposed by the development plan as an overall cap. The analysis also reveals that on an acreage basis, commercial development to date has exceeded at least two of the acreage figures evidenced in the documents which constitute the development plan, as amended.

See Ex. K at 2-3.

pursuant to procedures for modifications set forth in the Liberty Township Zoning Resolution. The Board of Trustees further indicated that any future applications for commercial development would be subject to a "two-step major deviation" development plan modification.[12]

Plaintiff did not submit Zoning Applications under this heightened "major modification" process. Instead, on June 29, 2004, Plaintiff, using standard Liberty Township procedure, applied for zoning permits to build an approximately 220,598 square foot Wal-Mart

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[12] The Board of Trustees wrote,

> the commercial development completed to date, and substantially through the approval process, has consumed most of the commercial footages imposed by the development plan as an overall cap. . . Under these circumstances, we have determined that, except for a few modest projects which have already completed the two-step "major" administrative review process, *all additional applicants seeking to construct retail or other arguable "commercial" development in the [WCC[will be required to seek approval as a "major" plan of modification*. In other words, we are instructing our zoning department to refrain from issuing zoning certificates for any additional commercial development in the [WCC], to issue such permits only after an approval through the "two-step" major process has been completed. Each process will be considered to be an application to consume any remaining portion of the square footage limitation, or exceed that limitation, and as a modification to expand the acreage limitation which we believe has been met.

See Def. Intervenor's Ex. K to Ex. 1 at 2-3 (emphasis added). The two-step approval process includes: (1) a review by the Commission or the Liberty Township Board of Zoning Appeals ("BZA"); and (2) a review by the Board of Trustees. *See* Zoning Resolution § 14.06(E) (eff. Oct. 3, 2002).

Supercenter and a Murphy Oil Gas Station in subarea 3. On September 30, 2004, the Zoning inspector denied Wedgewood LP's permit applications explaining that, in light of the January 19 Instructions, the applications: (1) failed to meet the requirements for development plans; (2) exceeded the acreage allowed under the floating cap; (3) were incomplete because they had neither been submitted for approval nor approved by the WCC architectural review committee; and (4) were inconsistent with both the Zoning Resolution and the PUD Plan.[13, 14]

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[13] Specifically, in denying Plaintiff's zoning permit application, the Zoning inspector wrote,

> a. The Development Plan for [WCC] remains incomplete, because at no time has this office received a revised Development Plan and Plat which in all respects conforms to the representations and commitments made at the meeting of the [Trustees] which occurred on November 18, 1991, and at the hearings which preceded that final hearing. The applicant, [Wedgewood LP], for the current zoning application, is an entity that is closely related to the entity Wedgewood Limited Partnership I which sought and obtained the rezoning of the land which is now the [WCC], and is also the Appellant, and the principals of these entitles [sic.] are directly responsible for the lack of performance in producing and filing a revised Development Plan which was promised;
>
> b. The request for approval does not meet either the documented or the promised and agreed upon requirements of the currently effective Development Plan applicable to the [WCC] Planned Commercial Zoning District. In the context of the amount of commercial development already constructed and allowed in the [WCC], the proposed construction would exceed the maximum allowable commercial acreage and square footage limitations that were expressly made a part of the development plan;

On October 20, 2004, Plaintiff appealed the Zoning Inspector's denial to the Liberty Township BZA. At the same time, Plaintiff also submitted a revised site plan and a letter withdrawing its permit application for the Murphy Oil gas station. In its appeal, Plaintiff stated that the Zoning Inspector had acted improperly in finding its zoning permit applications incomplete. Plaintiff also stated that the Zoning Inspector had acted improperly in finding that the proposed construction would exceed the maximum square footage limitations because the January 19 Instructions, which served as the basis for the Inspector's decision, were inaccurate. Further,

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> c. The application is incomplete because it does not include the required approval of the [WCC] Architectural Review Committee;
>
> d. The application is incomplete, internally inconsistent, and at variance with the requirements of the Liberty Township Resolution and the standards established and applicable under the [WCC] Plan in 9 detailed respects with regard to the Retail building component of the Applications and in 16 ways with respect to the Murphy Oil USA component of the applications.

See Def. Intervenor's Ex. A, Liberty Township Board of Zoning Appeals, Case No. BZA04-28, *Findings of Fact and Conclusions of Law* at 4-5 (Jan. 11, 2005) ("BZA Findings of Fact and Conclusions of Law").

[14] In regards to the Wal-Mart Supercenter, the Zoning Inspector cited nine different reasons that Plaintiff's application was "incomplete" and "internally inconsistent." Ex. B ¶ 4.a.i. For instance, the Inspector explained that though "Section 25.03 of the Zoning Resolution requires that the site plan show structural dimensions at the ground[, n]o structural dimensions are provided on the site plan which has been submitted." *Id.* ¶ 4.b.

Plaintiff asserted that the Zoning Inspector had incorrectly stated that she could not issue a Zoning Certificate without the architectural review committee's approval as such approval had not been required in the thirteen years since the PUD Plan had been approved. Finally, Plaintiff argued that the Zoning Inspector had mistakenly deemed its applications incomplete for allegedly failing to meet variance requests.[15]

B. Procedural History

Because Plaintiff has filed the instant federal court action in addition to filing a later suit in state court, a discussion of the procedural history of both the federal and state court proceedings is necessary.

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[15] A factual dispute exists between the parties regarding the details of the PUD Plan. Defendants and Intervenor assert that the PUD Plan was to be developed in five-year phases, and they contend that prior to the Board of Trustees' final approval of the PUD Plan, the Trustees held a November 11, 1991 public hearing, where it was decided that the WCC would be limited to the density of one million square feet of office space, 500,000 square feet of retail space, and 750 residential units. Further, Defendants assert that on November 15, 1991, an amendment was made that commercial construction could not exceed 500,000 square feet. As support for their contention, Defendants and Intervenor cite to the minutes from the Commission's October 1991 and November 1991 meetings. *See* Ex.'s G through J. Plaintiff counters that the parties never agreed to set a floating cap on commercial development. Moreover, though Plaintiff concedes that it agreed to the establishment of a WCC architectural review committee, it contends that the committee has never met, and the Commission has never before required the committee's pre-approval of a party's zoning permit application.

1. State Court Proceedings

On November 5, 2004, before the BZA had ruled on Plaintiff's appeal, Plaintiff filed the instant suit claiming that Defendants' reliance on the January 19 Instructions, Defendants' modification of the Zoning Resolution, and Defendants' denial of Plaintiff's Wal-Mart zoning permit application violated Plaintiff's constitutional rights. After Plaintiff filed this action, however, administrative activity regarding Plaintiff's denied zoning permit continued in Liberty Township.

On November 16, 2004, the Liberty Township BZA conducted a public hearing on Plaintiff's appeal of the Zoning Inspector's decision. Although Plaintiff did not present any testimonial evidence at the hearing, it did present arguments concerning the content and meaning of its plans, the development of the surrounding parcels, and a history of the WCC. On January 11, 2005,[16] the BZA affirmed Zoning Inspector's September 30 denial of Plaintiff's permit applications. See BZA Findings of Fact and Conclusions of Law. Thereafter, on February 8, 2005, Wedgewood LP filed its Notice of Appeal from the BZA's "final decision" in state court, pursuant to Ohio Revised Code § 2506.01.[17]

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[16] Though the appeal was initially scheduled for an earlier date, at Wedgewood's request, on December 7, 2004, the appeal was continued until January 11, 2005.

[17] Under Ohio law,

> Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may

On March 28, 2005, Plaintiff filed a Motion to Supplement the Record with Additional Evidence and to Stay the Briefing of the Case Pending a Decision on this Motion. Plaintiff contended that the Board of Trustees' directive that they must approve, after public hearing, all commercial development in WCC was "improper and illegal." Plaintiff also asserted that the use of lot 2069 to build an approximately 220,000 square foot Wal-Mart store is not a deviation from the PUD Plan because in 1991, Plaintiff was originally allotted up to 220,857 square feet for commercial development. Further, Plaintiff claimed that it was not bound by the floating cap because no such cap had been set forth in the WCC Development Standards, and because it had never agreed to allot a significant percentage of the purported floating cap to the developers of subareas 4, 5, 6, and 10, who were permitted to construct commercial buildings in place

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be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505 of the Revised Code, except as modified by this chapter.

The appeal provided in this chapter is in addition to any other remedy of appeal provided by law.

A "final order, adjudication, or decision" means an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person, but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding.

OHIO REV. CODE § 2506.01 (West 2006).

of the office space set forth in the PUD Plan. On or about May 13, 2005, the state court denied Plaintiff's Motion to Supplement the Record, explaining that in failing to address its questions and concerns regarding certain documents and procedures during the BZA hearing, Plaintiff had effectively waived its right to supplement the record in the trial court.

On July 18, 2005, the parties participated in a hearing before the Court of Common Pleas for Delaware County, Ohio, addressing only two narrow issues: (1) the legal basis for the floating cap on commercial development in the WCC development; and (2) whether the PUD Plan had expired by the time Plaintiff had submitted its Wal-Mart zoning permit application. The state court noted that there was a dearth of evidence on both of the issues in question, explaining:

> In this case, vital information is missing from the Liberty Township Board of Zoning Appeals ("BZA") record that was submitted to this Court. Scarce, if any, testimony or exhibits were contained within the record that resolved questions pertaining to the basis of the zoning inspector's decision to deny Wedgewood's application for a zoning certificate. Further, the record was also devoid of evidence as to the legal basis of the 500,000 square foot commercial limit imposed upon the WCC; and evidence as to the affect of the originally approved [Development P]lan for the WCC on the commercial limit.

See Wedgewood Ltd. P'ship I v. Liberty Twp. Bd. of Zoning Appeals, Case No. 05CV-F-02-101, Decision

and Entry at 3 (Ohio Ct. Com. Pl.'s Sept. 22, 2005) (Whitney, J.). Accordingly, the state court remanded the matter to the Liberty Township BZA to "carry out its role as the finder of fact to determine the basis of the zoning inspector's decision, as well as provide documentation for the 500,000 square foot commercial limit [(the floating cap)] on the [WCC] Development and the affect of the original [PUD] Plan." *Id.* The parties have since appealed the state court's ruling and are scheduled to appear for oral argument in the coming months.

2. Federal Court Proceedings

Plaintiff's federal court Complaint asserts nine counts against Defendants. Counts one through four, which Plaintiff brings pursuant to 42 U.S.C. § 1983, state that Defendants violated Plaintiff's procedural due process, substantive due process, and equal protection rights by relying on unconstitutionally vague ordinances to deny its various applications for Zoning Permits arbitrarily, capriciously, and willfully. Particularly, Plaintiff asserts that Defendants' interpretation of the PUD Plan and the WCC Development Standards to include the floating cap on commercial development was arbitrary, capricious, irrational and discriminatory. Counts five through eight assert identical claims pursuant to Ohio law. Count nine requests a declaratory judgment.

Specifically, Plaintiff seeks the following relief: (1) a declaratory judgment that Plaintiff's proposed development is in full compliance with all Liberty Township zoning standards; (2) a declaration that Defendants' actions attempting to establish and enforce the floating cap on commercial development in

the WCC are improper, impermissible, and a violation of Plaintiff's due process and equal protection rights; (3) an order enjoining Defendants from enforcing the floating cap on commercial development and the January 19 Instructions against Plaintiff; (4) an order requiring Defendants to issue Plaintiff a Zoning Certificate to develop its proposed Wal-Mart store; (5) an order enjoining Defendants from refusing to issue a Zoning Certificate for Plaintiff's proposed Wal-Mart store; (6) compensatory damages, attorney's fees, costs, and any other declarative, injunctive, or equitable relief the Court deems just and appropriate.

On May 20, 2005, the Court granted Intervenor leave to intervene as a party defendant in the suit. On August 9, 2005, this Court stayed discovery in the case pending resolution of the parties' jurisdictional motions, and denied Intervenor's Motion to Postpone Decisions on Defendants' Motion for Judgment on the Pleadings until Briefing is concluded on the Motion to Dismiss Submitted by Intervenors. Both Defendants' Motion to Dismiss and/or Motion for Judgment on the Pleadings and Intervenors' Motion to Dismiss have been fully briefed and are now ripe for this Court's decision. Because the Court finds that Defendants' Motion contains issues that overlap with those set forth in Intervenor's Motion to Dismiss, the Court will consider the Motions in tandem.

III. STANDARD OF REVIEW

A. Dismissal For Lack of Subject Matter Jurisdiction

Where a defendant raises the issue of lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of

the Federal Rules of Civil Procedure, the plaintiff has the burden of proving jurisdiction in order to survive the motion to dismiss. *DXL, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004); *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

Motions to dismiss for lack of subject matter jurisdiction fall into two general categories: facial attacks and factual attacks. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). A facial attack is a challenge to the sufficiency of a complaint, and, when considering the motion, the court must view the material allegations of that complaint as true and construe them in the light most favorable to the nonmoving party. *Id.* A factual attack is a challenge to the factual existence of subject matter jurisdiction. *Id.* No presumptive truthfulness applies to the factual allegations, and the court is free to weigh the evidence and to satisfy itself as to the existence of its power to hear the case. *Id.*; *Moir*, 895 F.2d at 269. When there is an attack on the factual basis for jurisdiction, the district court must weigh the evidence, and the plaintiff has the burden of proving that the court has jurisdiction over the subject matter. *Golden v. Gorno Bros., Inc.*, 410 F.3d 879, 881 (6th Cir. 2005).

B. Motion for Judgment on the Pleadings

A motion for judgment on the pleadings may be made "[a]fter the pleadings are closed but within such time as not to delay the trial." FED. R. CIV. P. 12(c). Pleadings are considered "closed" once a complaint and answer have been filed. FED. R. CIV. P. 7(a). Where the Rule 12(c) motion is based on the argument that the complaint fails to state a claim upon which relief may be granted, it is judged under the same standard of

review as a Rule 12(b)(6) motion. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 11 (6th Cir.1987) (finding "[w]here the Rule 12(b)(6) defense is raised by a Rule 12(c) motion for judgment on the pleadings, we must apply the standard for a Rule 12(b)(6) motion in reviewing the district court's decision").

C. Dismissal for Failure to State a Claim on Which Relief Can be Granted

A motion to dismiss under Rule 12(b)(6) is designed to test "whether a cognizable claim has been pleaded in the complaint." *Scheid v. Fanny Farmer Candy Shops, Inc.* 859 F.2d 434, 436 (6th Cir. 1988). In considering such a motion, the Court is limited to evaluating whether a plaintiff's complaint sets forth allegations sufficient to make out the elements of a cause of action. *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983). Dismissal under Rule 12(b)(6) streamlines litigation by "dispensing with needless discovery and fact-finding" on claims that are legally untenable in the first place. *See Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

All factual allegations made by a plaintiff are deemed admitted and ambiguous allegations must be construed in his favor. *Murphy v. Sofamor Danek Gp., Inc.*, 123 F.3d 394, 400 (6th Cir. 1997). A complaint should not be dismissed under Rule 12(b)(6) "'unless it appears beyond doubt that the [p]laintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 724 (6th Cir. 1996) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). While the complaint need not specify every detail of a plaintiff's claim, it must give the defendant "'fair notice of what

the plaintiff's claim is and the grounds upon which it rests.'" *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994) (quoting *Conley*, 355 U.S. at 47).

This liberal standard of review does require more than the bare assertion of legal conclusions. *Allard v. Weitzman*, 991 F.2d 1236, 1240 (6th Cir. 1993) (citation omitted). Under the federal pleading requirements, a plaintiff's complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* FED. R. CIV. P. 8(a)(2). The short and plain statement must "give the defendant fair notice of what plaintiff's claim is, and the grounds upon which it rests." A complaint must contain either direct or inferential allegations with respect to all the material elements necessary to sustain a recovery under some viable legal theory. *Id.* (citations omitted).

IV. ANALYSIS

A. Subject Matter Jurisdiction

Before proceeding to the merits of Plaintiff's claims, the Court must consider Defendants' and Intervenor's arguments that it cannot exercise subject matter jurisdiction over the matter. First, Defendants and Intervenor argue that the Court lacks subject matter jurisdiction over Plaintiff's constitutional claims because, pursuant to *Williamson County Regional Planning Comm'n. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), Plaintiff's procedural due process, substantive due process, and equal protection claims are not ripe for review. Second, assuming arguendo that the Court finds Plaintiff's claims ripe, Defendants and Intervenor contend that recent

amendments to Liberty Township's Zoning Resolution have mooted Plaintiff's claims. Third, Defendants and Intervenor assert that Plaintiff does not have standing to assert its vagueness claim. Fourth, Intervenor states that, pursuant to *San Remo Hotel, L.P. v. City & County of San Francisco, California*, 125 S.Ct. 2491 (2005), this Court should abstain from issuing a decision on Defendants' and Intervenor's Motions if and/or until the pending state action is resolved. The Court will consider each of the aforementioned arguments in turn.

1. Ripeness

The doctrine of ripeness arises from Article III of the United States Constitution, which, *inter alia*, limits the jurisdiction of federal courts to consideration of actual cases and controversies, and precludes federal courts from rendering advisory opinions. *Arnett v. Meyers*, 281 F.3d 552, 562 (6th Cir. 2002) (citing *Adcock v. Firestone Tire and Rubber Co.*, 822 F.2d 623, 627 (6th Cir. 1987)). "Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *Id.*

Defendants and Intervenor allege that because Plaintiff did not receive a final decision on its zoning permit applications or exhaust its administrative remedies before filing suit in federal court, pursuant to the rule set forth by the Supreme Court in *Williamson County*, its claims are not ripe for this Court's review. *See* 473 U.S. at 186. Plaintiff retorts that under *Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), its procedural

and substantive due process claims are *immediately cognizable* in federal court. Moreover, Plaintiff asserts that should the Court find the *Williamson County* requirements applicable to its due process and equal protection claims, those claims are ripe because the Zoning Inspector's September 30, 2004 denial of its permit applications amounts to a "final decision."

In *Williamson County*, plaintiff, the owner of a tract of land, filed suit against the county planning commission and others in federal court, alleging that the defendants had taken its property without just compensation in violation of the Fifth and Fourteenth Amendments. *See* 473 U.S. at 172. Plaintiff asserted that although the planning commission had granted it preliminary approval to construct a residential subdivision, after the plaintiff had spent millions of dollars on construction, the commission effectively made building the subdivision impossible by repeatedly changing its mind about the requirements of the pertinent zoning laws and subdivision regulations. *Id.*

The Supreme Court concluded that plaintiff's claim was not ripe for its review. *Williamson County*, 473 U.S. at 185. First, the Court found that plaintiff had not obtained a "final decision" regarding the application of the zoning ordinance and subdivision regulations to its property. *Id.* The Court reasoned that there was no finality because the commission's objections could have been resolved with variances, which, if granted would have allowed plaintiff to build as it desired, eliminating the need for the federal courts to address the difficult constitutional questions associated with regulatory takings. *See id.* at 186-94. Second, the Supreme Court recognized that plaintiff

had not yet suffered the injury contemplated by the Fifth Amendment's takings clause because it had not yet been refused just compensation. *See Williamson County*, 473 U.S. at 194-95. ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation...Thus, the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate post[-]deprivation remedy for the property loss.'") (citation omitted). Because Tennessee had an adequate procedure for pursuing inverse condemnation remedies, plaintiff was required to utilize that procedure before turning to the federal courts for assistance. *See id.*

In holding that plaintiff's claim was not ripe, the *Williamson County* court took pains to distinguish the concept of finality from the somewhat related but distinct concept of *exhaustion of state remedies*. *See Williamson County*, 473 U.S. at 192-93.[18] The reason the Court required plaintiff to pursue state remedies first was not so that plaintiff could obtain a judgment

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[18] The Supreme Court has held that *exhaustion*, "generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate," and is not required before a plaintiff may bring a suit predicated upon 42 U.S.C. § 1983." *Id.* (citing *Williamson County*, 473 U.S. at 193). *Finality*, on the other hand, "is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury. . . ." *Id.* The purpose of the final decision requirement is to ensure that the court will know the nature and extent of permitted development before adjudicating the validity of the regulation that purports to limit it. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

about whether the planning commission's actions had violated its rights; that would be an exhaustion requirement. *See Montgomery v. Carter County, Tennessee*, 226 F.3d 758, 765 (6th Cir. 2000) (discussing *Williamson County*, 473 U.S. at 193 ("While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures are clearly remedial.") (citation omitted)). Instead the court required plaintiff to seek variances so that the city's planning commission could have a final chance to determine, once and for all, whether and to what extent the pertinent zoning laws and subdivision regulations allowed the plaintiff to build on his property. *Id.* If the planning commission decided to grant plaintiff all of the variances it needed to build as it wished, then plaintiff would have the full use of its property after all and would have no justiciable takings claim (except possibly for the interim period during which the tract owner was not allowed to build). *Id.*

The holding of *Williamson County*, therefore, is that Fifth Amendment takings claims do not ripen in zoning cases until: (1) there has been a final decision by the relevant state decision-maker; and (2) the property owner has utilized appropriate state inverse condemnation procedures (or other comparable alternatives). *See Montgomery*, 226 F.3d at 765. This latter requirement applies only if a "reasonable, certain and adequate provision for obtaining compensation," exists in that state. *Williamson County*, 473 U.S. at 192-94. In this case, Plaintiff has

not alleged a Fifth Amendment taking, regulatory or otherwise. Accordingly, the Court must consider whether the finality and exhaustion requirements of *Williamson County* apply to Plaintiff's procedural due process, substantive due process, and/or equal protection claims.

Whether finality is required in any given case depends on the type of the harm alleged. *Hammond v. Baldwin*, 866 F.2d 172, 176 (6th Cir. 1989). For instance, "[i]f the injury the [plaintiffs] seek to redress is harm to their property amounting to a 'deprivation' in constitutional terms, a final judgment is required," but if the injury is the infirmity of the process, neither a final judgment nor exhaustion is required." *See Bowers v. City of Flint*, 325 F.3d 758, 762 (6th Cir. 2003) (citing *Hammond*, 866 F.2d at 176). In essence, a due process challenge to an allegedly unconstitutional procedure brought under section 1983 is *not* subject to a finality requirement, while a claim alleging harm or deprivation of property "is substantive, and, so, a final judgment (but not exhaustion) is required." *Id.*; *see Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991) ("a procedural due process claim is instantly cognizable in federal court without requiring a final decision on a proposed development from the responsible municipal agency"); *see also Hammond*, 866 F.2d at 176 (in cases of the present type "'the allegedly infirm process is an injury in itself,' whereas, in the context of a takings claim, the alleged injury . . . cannot be assessed with any degree of certainty until the municipality arrives at a final decision").

Counts one and two of Plaintiff's Complaint, which assert that Defendants violated Plaintiff's due process

rights by arbitrarily, capriciously, and willfully ignoring Plaintiff's compliance with Defendants' legitimate zoning standards to deny Plaintiff its requested Zoning Certificates, constitute pure due process claims. *See* Complaint ¶¶ 29-40. Under the rule promulgated by *Nasierowski*, therefore, the Court finds that Plaintiff need not comply with the *Williamson* finality or exhaustion requirement to assert these claims.[19, 20] Accordingly, the Court finds

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[19] The Court notes that the Sixth Circuit has issued many inconsistent opinions on the issue of whether a plaintiff's procedural and/or substantive due process claims are subject to *Williamson County* finality and exhaustion requirements. *See Bigelow v. Michigan Dept. of Nat. Resources*, 970 F.2d 154, 159 (6th Cir. 1992) (noting that due process claims are immediately cognizable in federal court without a need for exhaustion but holding that when substantive and procedural due process claims arise from a taking the finality requirements must be met before those claims could be asserted) (citing *Hoehne v. San Benito County*, 870 F.2d 529, 532 (9th Cir. 1989)); *see also, Harris v. City of Akron*, 20 F.3d 1395, 1402-03 (6th Cir. 1994) (ignoring the holding in Bigelow requiring finality as to due process claims because the case was not presented as a "taking case," but as a "pure due process case," since the relevant takings claims were already dismissed on finality grounds); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 201, n.2 (6th Cir. 1993) (following *Nasierowski*, despite its opinion that the substantive due process claim at issue was "no different from an ordinary takings claim"); *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1362-63 (6th Cir. 1992) (due to the holding in *Nasierowski*, the city ordinance prohibiting community treatment centers like plaintiff's, violated due process although the plaintiff had not exhausted his takings claims). Despite the aforementioned inconsistencies, however, the *Nasierowski* holding remains binding on this Court until either the Supreme Court issues an inconsistent opinion or the Circuit Court sitting en banc elects to reconsider the matter. *See Plonski*, 1997 WL 33147776, at *5 (citing *Seguin v. City of Sterling Heights*, 968 F.2d 584, 590 (6th Cir. 1992) and *Salmi v. Sec. of*

Health & Human Servs., 774 F.2d 685, 689 (6th Cir. 1985)).

[20] In *Choate's Air Conditioning & Heating v. Light, Gas & Water Division of the City of Memphis*, 16 Fed. Appx. 323, 331 (6th Cir. 2001), plaintiff, a property owner, sued defendant, a municipal entity alleging that defendant had violated plaintiff's substantive due process rights by violating an easement-agreement by leasing a portion of the easement to various telecommunications companies. The *Choate's* court dismissed plaintiff's substantive due process claim for failing to state a claim on which relief can be granted. *Id.* at 330. The court subsequently dismissed plaintiff's remaining claims as unripe under *Williamson County*, noting that they were nothing but "repackaged takings claim[s]." *Id.* at 330-31. ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims. . . Indeed, the Fifth Amendment's Just Compensation Clause governs the precise claim set forth by Choate's.").

In *Vashi v. Charter Twp. of W. Bloomfield*, 159 F. Supp. 2d 608 (E.D. Mich. 2001), plaintiffs, unsuccessful applicants for a site plan and special use permit approval for a child daycare center sued the township and its planning commission members for conspiracy to violate plaintiffs' civil rights, alleged equal protection and substantive due process violations, and gross negligence, contending that they were denied a permit because of their ethnic and religious status. The *Vashi* court found that plaintiffs' due process and equal protection claims were subject to the *Williamson County* finality requirement. *See id.* at 616. The *Vashi* court explained that where plaintiffs were "not challenging the legality of the zoning ordinances, or the legality of the process used by Township to render decisions on land use proposal applications," but, rather, were "claiming that the defendants reached their decision to deny the daycare proposal based on the illegitimate criteria of the plaintiffs' ethnicity and race," plaintiffs' was not akin to an immediately ripe *Nasierowski* challenge to a zoning ordinance. *Id.*

In its Reply Memorandum, Intervenor contends that as in *Choate's* and *Vashi*, Plaintiff has merely attempted to repackage

that both counts one and two are ripe for its review.

It is undisputed, however, that Plaintiff's equal protection claim is subject to the *Williamson County* final decision requirement. *See Seguin*, 968 F.2d at 588; *V. Jacobs & Sons v. Saginaw County Dept. of Public Health*, 284 F. Supp. 2d 711, 718 (E.D. Mich. 2003) (plaintiff required to "exhaust" state remedies for its "as applied" equal protection claim); *Bigelow*, 970 F.2d at 159 (finding that the *Williamson* finality requirement applies to both equal protection and takings claims). Thus, in this case, a ripe equal protection claim arising from the denial of Plaintiff's requested zoning permit must involve a final decision by the government agency or government agent responsible for applying Liberty Township's zoning regulations to Plaintiff's zoning permit application.

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regulatory takings claims as due process claims in an effort to avoid the ripeness requirements of *Williamson County*. Intervenor's Reply at 18. Intervenor asserts that, as in *Vashi*, where plaintiffs asserted that their due process rights were violated based on their race, here, Plaintiff has alleged that its due process rights were violated because of Liberty Township's bias against Wal-Mart customers. Accordingly, Intervenor argues that *Williamson County* finality applies. Though Plaintiff does assert that Defendants' bias is at the heart of its zoning decisions, Plaintiff also claims that in an effort to keep Plaintiff from building its sought-after design, Defendants failed to comply with proper Liberty Township procedure in denying Plaintiff's permit applications. For instance, Plaintiff claims that if, as Defendants claim, the January 19 Instructions are truly a legislative document, they were not passed pursuant to Ohio law or the procedures set forth in the Liberty Township Zoning Resolution. Such claims distinguish this case from both *Choate's* and *Vashi*; thus, the Court finds *Nasierowski* applicable.

Plaintiff has satisfied the finality requirement. As noted above, finality "is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *See Bowers*, 325 F.3d at 762; *see also, Bannum*, 958 F.2d at 1365. In the present case, Plaintiff made a meaningful application for a zoning certificate to the Zoning Inspector, and her decision to deny Plaintiff its requested permit constitutes a final decision.[21]

The second prong of *Williamson County*, requiring a plaintiff to seek compensation from the state, does not apply to this case. Courts have held that, "*bona fide* equal protection claims arising from land-use decisions can be made independently from a takings claim and without being subject to *Williamson* [*County* exhaustion]." *See Cramer v. Vitale*, 359 F. Supp. 2d 621, 629 (E.D. Mich. 2005) (citing *Forseth v. Vill. of Sussex*, 199 F.3d 363, 370 (7th Cir. 2000) (holding that, "[a]bsent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land-use context, the plaintiff must demonstrate

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[21] Although Defendants argue that the Zoning Inspector's decision cannot be considered final until state proceedings are complete, courts within Ohio have long held that appeal under Chapter 2506 of the Ohio Revised Code is a "judicial review of a final administrative decision" as opposed to an administrative remedy. *See Wise v. Milan Twp.*, 2003 WL 21105080 (N.D. Ohio May 12, 2003); *Karches v. City of Cincinnati*, 526 N.E.2d 1350 (Ohio 1988); *Alexander v. City of Oakwood*, 1993 WL 1318608 (S.D. Ohio Jan. 27, 1993) ("Defendants point to a remedy, an appeal to common pleas court under [O.R.C.] § 2506.01, that is judicial. This remedy is judicial, not administrative, and, thus, cannot support a motion for summary judgment on a claim for failure to exhaust administrative remedies.").

'governmental action wholly impossible to relate to legitimate governmental objectives.") (citations omitted)). Accordingly, Plaintiff's equal protection claim is ripe for its review.

2. Mootness

As noted *supra*, the jurisdiction of federal courts is limited to the resolution of actual "cases" and "controversies." *See See* U.S. CONST. art. III, § 2, cl. 1; *Raines v. Byrd*, 521 U.S. 811, 818 (1997); *NRA of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997). A case becomes moot "when the issues presented are no longer live or parties lack a legally cognizable interest in the outcome." *See Cleveland Branch, NAACP v. City of Parma, Ohio*, 263 F.3d 513, 530 (6th Cir. 2001) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). The mootness doctrine posits that cases, which, due to changed circumstances, can no longer impact the interests of the litigants, may not be adjudicated in the federal courts. *See DeFunis v. Odegaard*, 416 U.S. 312 (1974) (plaintiff's case challenging the constitutionality of a state law school's admissions process was found moot; plaintiff was nearing completion of his final year in law school when the case reached the United States Supreme Court for review, and the Court found that its decision would no longer affect his interests).[22]

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[22] The Supreme Court has repeatedly described mootness as, "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167, 212 (2000); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980).

Defendants and Intervenor argue that Plaintiff's claims are moot because Plaintiff "is no longer entitled to the development it seeks in this litigation." *See* Intervenor's Motion at 16. According to Defendants and Intervenor, because Plaintiff failed to develop lot number 2069 within three years from the initial approval of the PUD Plan and failed to apply for and receive approval from the Commission to extend the applicability of the WCC Development Standards, the PUD Plan upon which Plaintiff's claims rely, expired in 1994. Alternatively, Defendants and Intervenor contend that Plaintiff's claims are moot due to the passage of the December 8, 2004 amendments to the Liberty Township Zoning Resolution. *See* Ex. L, § 14.04(23). Plaintiff counters that according to the WCC Development Standards, construction in the WCC was projected to take approximately ten to twelve years, Plaintiff filed a plat map as required by the Zoning Resolution, and Defendants have not set forth facts establishing that the PUD Plan and the corresponding WCC Development Standards are no longer applicable. Further, Plaintiff argues that Defendants cannot foreclose its claims by applying the most recent amendments to the Liberty Township Zoning Resolution retroactively.

i. Whether the PUD Plan has Expired

Defendants and Intervenor assert that according to the Liberty Township Zoning Resolution, because Plaintiff both failed to develop and failed to file a plat map for lot number 2069 within three years of the filing of the PUD Plan and the WCC Development Standards, Liberty Township's preliminary approval of Plaintiff's Planned Commercial ("PC") zoning of lot

2069 has expired. Plaintiff counters that the PUD Plan has *not* expired because under the Liberty Township Zoning Resolution, the only regulations governing development within the WCC were the WCC Development Standards, which, rather than expiring in three years, projected completion of the WCC within ten to twelve years, occurring "as market conditions dictate." *See* Ex. F ¶¶ 7-8. Moreover, assuming arguendo that the Court finds the three-year expiration period applicable to Plaintiff's proposed development, Plaintiff asserts that it properly recorded all plats, and notes that until this litigation began, Defendants permitted many other developers to proceed with construction according to the ten to twelve year timeline set forth in the WCC Development Standards.

Pursuant to the PUD Plan, lot 2069 was zoned "Planned Commercial"[23] ("PC"). In a Liberty Township PC zone, the developer gets to "craft its own unique zoning that applies only to that developer's parcel." *See* Zoning Resolution §§ 14.01, 14.06(a)-(c) (eff. May 1, 1991).[24] To allow for this "unique zoning," each

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[23] "Planned Commercial" zones are also referred to as "Planned Commercial and Office" zones. *See* Intrevenor's Motion at 8 (citing Foust Aff, at Tab G, "Oct. 2, 1991 Meeting Minutes").

[24] Section 14.01, "Planned Commercial and Office District – Purpose," provides:

> The Township, recognizing that with increased urbanization and population growth comes increased demands for well organized commercial areas to provide employment, goods and services to area residents as well as to provide a balanced economy within the township, hereby provides for the Planned Commercial and Office District, *intending hereby to promote*

developer's PC plan becomes part of an amendment to the Liberty Township Zoning Resolution. *See* Zoning Resolution §§ 14.06(d) ("The Development Plan as approved by the Township Trustees shall constitute *an amendment to the zoning resolution as it applies to the lands included in the approved amendment.*"). Further, the Township's approval, "shall be for a period of (3) years to allow the preparation of plats required by the Subdivision of Delaware County, Ohio," and "[u]nless the required plats are properly recorded and work on said development commenced within three (3) years, the approval shall be voided and the land shall automatically revert to R-1 District unless the application for time extension is timely submitted and approved." *Id.* Finally, where the proposed timetable for a specific PC development includes developing the land in phases, "all phases to be developed after the first, shall be fully described in textural [sic] form in a manner calculated to give township officials definitive guidelines for approval of future phases." *Id.* § 14.06(b)(8).

As a threshold matter, the Court finds persuasive Plaintiff's argument that because the PUD Plan amended Liberty Township's Zoning Resolution for all WCC property, the WCC Development Standards did *not* expire in 1994. As set forth above, the Liberty Township Zoning Resolution states clearly that PUD zoning plans become amendments to the Liberty

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the variety and flexibility of land development for commercial purposes that are necessary to meet these demands while still preserving and enhancing the health, safety and general welfare of the inhabitants of the Township.

See Zoning Resolution § 14.01.

Township Zoning Resolution in order to allow each developer to proceed with construction according to his specific needs. *See* Liberty Township Zoning Resolution §§ 14.01, 14.06(a)-(c). The WCC Development Standards clearly propose a ten to twelve year construction time, and note that development would proceed as "market conditions dictate." Ex. F ¶ 7. Under the Liberty Township Zoning Resolution, these revised timelines for construction within the boundaries of the WCC became amendments to the Liberty Township Zoning Resolution applicable to all WCC developers, and the fact that Plaintiff did not apply for a construction permit within three years does not mean that the PUD Plan expired.

In finding that the three-year expiration period does not apply to Plaintiff's property, this Court relies, in part, on *Solove v. Westerville City Council*, 2002 WL 1291797 (Ohio App. June 13, 2002). In *Solove*, developers appealed the city council's decision to disapprove an ordinance that would implement a planned community commercial ("PCC") plan. *Id.* at *1. In 1987 developers submitted a comprehensive plan to build within a local PCC district for the commission's approval. *Id.* at *8. On appeal, plaintiffs argued that the defendants' consideration of the ordinance should have been governed by the PCC development plan rather than by the general provisions of the zoning code. *Id.* at *9. Defendants countered that the designation of the property as a PCC district was a "hollow shell" because there were no accompanying standards under which construction must occur. *Id.* The *Solove* court ruled for plaintiffs, concluding that the idea contemplated by Ohio law is that "once a Development Plan is approved, such plan will contain the standards applicable to that individual

PCC district and to no other property that may also be zoned PCC." *Id.* at *15. Therefore, as in *Solove*, in this case, the Court determines that the standards applicable to the WCC are those implemented in 1991/1992. 2002 WL 12917987.

Further, the Court notes that based on the record before it at this time, there is a paucity of evidence to support Defendants' and Intervenor's argument that Plaintiff failed to file a plat map within three years. There are multiple plat maps attached to the WCC Development Standards, which were indisputably filed with the Commission. *See* Ex. F. Thus, though Defendants suggest that Plaintiff failed to file the necessary plat, the available evidence disputes that claim.[25]

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[25] Intervenor relies on *Wallingford v. Liberty Twp.*, 2001 Ohio App. LEXIS 2411 (Ohio App. May 21, 2001) to assert that the PUD Plan expired in 1994. In *Wallingford*, the appellate court affirmed the trial court's decision dismissing the constitutional claims filed by plaintiffs when the Liberty Township Zoning Commission rejected their applications for permits to build on their property, which is in a Planned Residential District ("PRD") . *Id.* at *1. *Wallingford* is inapposite to the case sub judice. In *Wallingford*, it was undisputed that plaintiffs, landowners of property within a PRD, had failed to begin construction, file a plat map, or apply for an extension of their PRD development plan within the three-year time period set forth in the Liberty Township Zoning Resolution. *See id.* at *5-6. In this case, however, the record contains no substantive evidence to support Defendants' and Intervenor's assertion that Plaintiff failed to file a plat map within three years.

ii. Retroactive Application of Amended Zoning Resolution

On December 8, 2004, the Commission passed an amendment to the Liberty Township Zoning Resolution, which provides that, "[r]etail or mixed-use buildings, containing retail uses, shall contain no more than 65,000 gross square feet of floor area under one roof." *See* Ex. L, § 14.04(23). Defendants and Intervenor contend that because Wedgewood's zoning permit application sought to build a 220,598 square foot retail store, its proposal did not comply with that 65,000 square foot limit, and was, therefore, correctly denied. Plaintiff, however, asserts that because it applied for a zoning permit in June 2004, six months before the enactment of the 65,000 square foot cap amendment, Defendants' attempts to apply that amendment retroactively must fail.

Property rights "are created and their dimensions defined by existing rules or understanding that stem from an independent source such as state law." *Stile v. Copley Twp., Ohio*, 115 F. Supp. 2d 854, 865, n.21 (N.D. Ohio 2000) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)) (commission's decision to eliminate one category of permitted uses for plaintiff's property amounted to an unauthorized zoning amendment which could *not* be applied to plaintiff's permit application retroactively). In Ohio, it is well-established that a property owner's right to an existing zoning classification vests upon the submission of an application for a building or zoning certificate. *Gibson v. Oberlin*, 167 N.E.2d 651 (Ohio 1993) (finding that the issuance of a permit was governed by the law in effect *at the time of the application therefor* and not by an amendment to such law enacted during the

pendency of litigation to compel the issuance thereof); *see also Stile*, 115 F. Supp. 2d at 865, n.21 (citing *Gibson* and finding that plaintiff had a vested right in the township's pre-amendment zoning procedures). It is undisputed that Plaintiff applied to the Commission for building permits on June 29, 2004.[26] The Amendments to the Liberty Township Zoning Resolution on which Defendants and Intervenor rely, however, were not enacted until December 8, 2004. Accordingly, under Ohio law, Defendants and Intervenor cannot apply retroactively the 2004 Amendments limiting retail space within the WCC to 65,000 square feet.

3. Whether Plaintiff has Standing to Assert its Vagueness Claim

The case or controversy limitation of Article III requires that a party invoking federal jurisdiction has standing – in other words, a "personal stake in the

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[26] Intervenor relies on *Smith v. Juillerat*, 119 N.E.2d 611 (Ohio 1954), to argue that Plaintiff had no vested property interest in Liberty Township's pre-Amendment zoning. The *Juillerat* case concerned a defendant who did not promptly use his property for a nonconforming use after he had been licensed to do so, thereby failing to perfect that nonconforming use. *Id.* at 612 ("where no substantial nonconforming use is made of property, even though such use is contemplated and money is expended in preliminary work to that end, a property owner acquires no vested right to such use and is deprived of non by the operation of a valid zoning ordinance denying the right to proceed with his intended use of the property."). The Court finds *Juillerat* distinguishable because Plaintiff does not seek to use its property for a nonconforming use. It is undisputed that under the PUD Plan, subarea 3 was zoned PC, making permissible Plaintiff's intended use of that property for a commercial business venture.

outcome"of the action. *See Baker v. Carr*, 369 U.S. 186, 294 (1962); *Stevenson v. J.C. Bradford and Co.*, 277 F.3d 838, 852-53 (6th Cir. 2002). To establish a personal stake in the outcome of an action, a plaintiff must allege an "injury in fact" to his pre-existing, legally protected interest. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted). That injury must be "(a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.*; *see also*, *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622 (6th Cir. 2000). A particularized injury is one that "affect[s] the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560, n.1. Further, in cases in which a prisoner alleges he has been denied access to court, an inmate establishes standing by showing that he suffered an actual litigation related injury or legal prejudice because of the actions of the defendant. *See Lewis v. Casey*, 518 U.S. 343, 349-51 (1996) (requiring "actual prejudice with respect to the contemplated or existing litigation, such as the inability to meet a filing deadline or present a claim").

In addition, "standing does not have to be maintained throughout all stages of the litigation." *Cleveland Branch, NAACP*, 263 F.3d at 524. "Instead, [standing] is to be determined as of the time the complaint is filed." *Id.* The *Cleveland Branch* court exhaustively reviewed United States Supreme Court precedent to conclude that "'jurisdiction is tested by the facts as they existed when the action [was] brought' and 'that after vesting, it cannot be ousted by subsequent events." *Id.* (quoting *Smith v. Sperling*, 354 U.S. 91, 93, n.1 (1957)). Consequently, the proper inquiry is whether a plaintiff was suffering or had

suffered an actual injury *at the time a complaint was filed*. *Id.* (emphasis added).

Count three of Plaintiff's Complaint alleges that the purported floating cap on commercial development set forth in the January 19 Instructions is unconstitutionally vague. Accordingly, Plaintiff claims that because Defendants based the floating cap on their interpretation of the Liberty Township Zoning Resolution and the WCC Development Standards, the Resolution and the Standards are also unconstitutionally vague. Defendants assert that Plaintiff lacks standing to assert its vagueness claim because it failed to seek zoning permit approval through the two-step review procedure instituted through the January 19 Instructions. *See* Defs.' Motion at 17. According to Defendants, because the Commission, the BZA, and the Trustees have not been given a chance to consider whether the purported floating cap precludes Wedgewood LP from developing the property as it wishes, its vagueness challenge is premature. *Id.* at 18.

The Court finds that Plaintiff has standing to challenge the Liberty Township Zoning Resolution and the WCC Development Standards to the extent that they include the floating cap on commercial development. The denial of Plaintiff's zoning permit application is an "actual injury," which, according to the Zoning Inspector's September 20, 2004 letter, was based in part on the January 19 Instructions.[27] *See Brandywine, Inc. v. City of Richmond*, 359 F.3d 830,

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[27] *See supra* notes 13 and 14 (setting forth the Zoning Inspector's reasons for denying Plaintiff's zoning permit application).

835 (6th Cir. 2004) (plaintiffs had standing to challenge the zoning scheme's ban on adult bookstores in B-3 zones; because they were injured in fact when they were forced to close their business, a causal relationship existed between the enforcement of the zoning scheme and the harm, and the injury was redressable by an award of monetary damages for lost business); *Stephenson v. Davenport Community School Dist.*, 110 F.3d 1303, 1308 (8th Cir.1997) (student's standing to bring a void-for-vagueness claim derived from actual injury, directly caused by school district's regulation that could be compensated by favorable decision by the court) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)). Moreover, because the Liberty Township BZA issued a January 11, 2005 decision affirming the Zoning Inspector's decision denying Plaintiff its requested zoning permit, Defendants' April 2005 argument that Liberty Township had not been given the opportunity to consider whether Plaintiff's proposed Wal-Mart store would be permissible under the floating cap, is disingenuous.

4. Abstention

In its Reply Memorandum, Intervenor raised, for the first time, its contention that should the Court decline to dismiss Plaintiff's case under *Williamson County*, it should at least stay Plaintiff's claims pursuant to the recent decision by the Supreme Court in *San Remo Hotel, L.P. v. City & County of San Francisco, California. See* 125 S.Ct. at 2491. A brief discussion of *San Remo* is necessary. In *San Remo*, plaintiffs, hotel owners, challenged a city hotel ordinance, which imposed a large fee on the conversion

of residential rooms to tourist rooms, claiming that it amounted to a regulatory "taking without just compensation." *Id.* at 2495-500. Initially, the plaintiffs challenged the new ordinance in a state inverse condemnation proceeding, but later filed a separate action in the federal district court in California under 42 U.S.C. § 1983. *See id.* The trial judge granted summary judgment for the city. *Id.* On appeal, however, the U.S. Court of Appeals for the Ninth Circuit granted *Pullman* abstention.[28] *Id.* The court explained that on its face, the ordinance worked a "taking," and the as-applied challenge was unripe because under *Williamson County*, the plaintiffs were required to seek compensation in the state courts before filing suit in federal court. *Id.*; *see San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095 (9th Cir. 2004) (citing *Williamson County*, 473 U.S. at 172).

The plaintiffs subsequently pursued their inverse condemnation proceeding in the California state court and moved to reserve their federal claims for

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[28] Under the *Pullman* absention doctrine, where,

> . . . federal jurisdiction has been properly invoked and the constitutionality of a state statute or administrative order challenged, the federal court may, and in the exercise of a sound discretion normally should, stay the action in the federal forum if the construction of pertinent but unclear state law by the state courts may obviate the necessity for a decision of the federal constitutional question or substantially modify the constitutional issue.

See Tyler v. Collins, 709 F.2d 1106, 1108 (6th Cir. 1983) (referencing 1A Moore's Federal Practice ¶ 0.203[1] (1982) (citing *Railroad Comm'n. of Texas v. Pullman Co.*, 312 U.S. 496 (1941)).

resolution in federal court. *San Remo*, 125 S. Ct. at 2499. The California Supreme Court sustained the San Francisco ordinance against a full range of takings challenges and affirmed the trial court's order, dismissing the complaint. *Id.*; *San Remo Hotel v. City & County of San Francisco*, 41 P.2d 87 (Cal. 2004). The plaintiffs did not seek certiorari on the Ninth Circuit's ruling, choosing, instead, to file an amended complaint in the California district court, asserting that they had expressly reserved their federal takings claims. 125 S.Ct. at 2499. The district court held that the plaintiffs' facial attack on the San Francisco ordinance was barred by both the statute of limitations and the general rule of issue preclusion, and the Ninth Circuit Court of Appeals affirmed. *Id.* at 2499-500.

The Supreme court granted certiorari[29] and affirmed, holding that under the detailed circumstances of the case, which included "[b]road takings claims in language that sounded in the rules and standards established and refined by [the U.S. Supreme Court's] takings jurisprudence," that the federal court may not disregard the full faith and credit statute, 28 U.S.C. § 1738, in the proceeding. *Id.* at 2500. The Court held that the plaintiffs were precluded by the state judgment from proceeding on identical claims in the federal courts, explaining that, "[t]here is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather

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[29] Before *San Remo*, the Ninth Circuit and the Second Circuit were split on the issue of whether parties "who litigate state-law takings claims in state court involuntarily" pursuant to *Williamson County* can be precluded from having those very claims resolved by a federal court. *See Santini v. Connecticut Hazardous Waste Mgmt.*, 342 F.3d 118, 130 (2d Cir. 2003) (noting that plaintiffs have a right to vindicate their federal claims in a federal forum); *but see, San Remo Hotel*, 145 F.3d at 1095. The Court limited its review to the Circuit Court split, explaining:

> As this case is presented to us, under our limited grant of certiorari, we have only one narrow question to decide: whether we should create an exception to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation. *See Williamson County*, 473 U.S. at 172.

San Remo, 125 S.Ct. at 2501.

have not been engaged at all." *Id.* at 2504 (citing *Allen v. McCurry*, 449 U.S. 90, 94-96 (1980)).

Intervenor asserts that based on the Supreme Court's ruling in *San Remo*, this Court should abstain until Plaintiff's parallel state court proceedings are complete. Intervenor's Reply at 9. According to Intervenor, Plaintiff's federal constitutional claims will likely be moot upon a state court judgment that: (1) Plaintiff was required to submit an application for a major modification; (2) Plaintiff was not entitled to its requested zoning certificate; or (3) the PUD Plan and the WCC Development Standards included a floating cap on commercial development. Plaintiff did not have the opportunity to respond to Intervenor's argument.

The Court finds abstention unnecessary in this case. *Griffin v. School Bd. of Prince Edward County*, 377 U.S. 218, 228-29 (1964). In *Griffin*, African-American school children sued the County School Board of Prince Edward County, Virginia and others to enjoin them from refusing to operate an efficient system of free public schools in Prince Edward County and to enjoin payment of public funds to help support private schools which excluded students on account of race. *See id.* Defendants asserted that the Supreme Court should abstain from deciding plaintiffs' claims until the Virginia Supreme Court had had the opportunity to decide whether the conduct complained of violated the United States Constitution and/or the laws of Virginia. *Id.* The Court, however, chose to consider the merits of plaintiffs' claims, explaining:

> . . . [T]his is not a case for abstention. In the first place, the Supreme Court of Appeals of Virginia has already passed upon the state law

> with respect to all the issues here. *County School Board of Prince Edward County v. Griffin*, 204 Va. 650, 133 S.E.2d 565 (1963). But quite independently of this, we hold that the issues here imperatively call for decision now. The case has been delayed since 1951 by resistance at the state and county level, by legislation, and by lawsuits. The original plaintiffs have doubtless all passed high school age. There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in *Brown v. Board of Education*, *supra*, had been denied Prince Edward County Negro children. We accordingly reverse the Court of Appeals' judgment remanding the case to the District Court for abstention, and we proceed to the merits.

Id.

Similarly, in this case Plaintiff's constitutional claims have been unresolved for too long for this Court to abstain from deciding the pending Motions. Plaintiff's federal action was filed in November 2004. Plaintiff's state action was filed in early 2005. It is now October 2006, and there has still been no definitive ruling on any of the factual disputes necessary to decide Plaintiff's claims. In fact, on September 22, 2005, the state court judge, finding the record devoid of "vital information" necessary to the court's analysis, remanded the case to the Liberty Township BZA, and an appeal to the state appellate court is currently pending. *See Wedgewood Ltd. P'ship I*, Case No. 05CV-F-02-101, Decision and Entry at 3. Though Plaintiff's claims may not be as politically weighty as

the plaintiffs' claims in *Griffin*, justice delayed is still justice denied. Should this Court decline to rule on Plaintiff's claims at this time, it would only further postpone any possible outcome to the parties' dispute, a result that this Court finds unacceptable. Accordingly, the Court proceeds to the merits Plaintiff's claims.[30]

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[30] Defendants also assert that the Court should abstain from asserting jurisdiction over Plaintiff's claims pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* doctrine states that "in light of [the Supreme Court's] concern with principles of comity and federalisn[,]" "in cases seeking to enjoin ongoing state criminal proceedings, federal courts should not exercise jurisdiction, but instead, should dismiss the cases in their entirety." *See Watts v. Burkhart*, 854 F.2d 839 (6th Cir. 1988) (citing Younger, 401 U.S. at 37). The Sixth Circuit has rejected similar claims in the past. *Millington Homes Investors, ltd. v. City of Millington, Tennessee*, 1995 WL 394143, at *4 (6th Cir. July 3, 1995). In *Millington*, plaintiff sued defendants in federal court asserting that defendants had deprived it of property without due process of law. *Id.* at *1. Though defendants argued that the court should abstain from hearing the case because plaintiff had filed a similar action in Tennessee state court, the *Millington* court found defendants' contention to be without merit. *See id.* at *4. The court explained:

> *Younger* and its progeny have been applied to cases in which a federal court is asked to enjoin state court proceedings." In this case, plaintiff does not seek to enjoin ongoing state court proceedings; rather, plaintiff filed the same claims in federal and state court. The Supreme Court has noted that "federal courts and state courts often find themselves exercising concurrent jurisdiction over the same subject matter, and when that happens, a federal court generally need neither abstain (i.e., dismiss the case before it) nor defer to the state to the state proceedings (i.e., withhold action until the state proceedings have concluded)." *Growe v. Emison*, 113 S. Ct. 1075, 1080 (1993). Furthermore, "[f]ederal courts have an interest in the orderly functioning of the federal judicial

B. Whether Plaintiff Has Stated Claims On Which Relief May be Granted

Plaintiff alleges that Defendants deprived it of its civil rights in violation of 42 U.S.C. § 1983. *See* Complaint ¶¶ 29-56. Specifically, Plaintiff maintains that Defendants, while acting under color of state law, deprived it of its right to procedural and substantive due process, as well as its right to equal protection. *Id.* Consequently, Plaintiff contends that it is entitled to its requested relief. *Id.* at 19.

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system and in the preservation and exercise of their jurisdiction." *Polykoff v. Collins*, 816 F.2d 1326, 1333 (9th Cir. 1987). "[P]rinciples of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in state court." *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 264, n.8 (1977). *See also, Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2216 (1992) ("Abstention rarely should be invoked, because the federal courts have a 'virtually unflagging obligation . . .to exercise the jurisdiction given them.'") (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

See id. Thus, despite Defendants' assertions to the contrary, as in *Millington*, the *Younger* doctrine does not require abstention in this case.

Section 1983[31] creates a cause of action for deprivation of civil rights. *Jaco v. Bloechle*, 739 F.2d 239, 241 (6th Cir. 1984). For purposes of Section 1983 claims, the term "person" may be applied "to bodies politic and corporate." *Quarles v. City of E. Cleveland*, 1999 WL 1336112, *3 (6th Cir. 1999) (citing *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 688 (1978)). This Court has previously held that township boards of trustees are "persons" within the meaning of section 1983. *Danis Clarkco Landfill Co. v. Trustees of German Twp.*, 1997 U.S. Dist. LEXIS 21081, at *84-85 (S.D. Ohio, Apr. 16, 1997). Moreover, the Ohio Supreme Court has held that any "governmental body having powers and duties of government" is a body politic and corporate. *See J.D. Partnership v. Berlin Twp. Bd. of Trustees*, 412 F. Supp. 2d 772, 777 (S.D. Ohio 2005). Chapter 519 of the Ohio Revised Code makes a township zoning commission responsible for zoning matters in a township; accordingly, Defendants have powers and duties of government, and are therefore "persons" within the meaning of Section 1983. Defendants acted under color of state law because Defendants' actions related to the Liberty Township Zoning Resolution. *See* Ohio Rev. Code

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[31] The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

§§ 503.01, *et seq.*, 505.01, *et seq.*, 519.01, *et seq.* Having decided that Defendants are persons and that they acted under color of law, the Court will now consider whether Plaintiff's claims satisfy the following elements of a Section 1983 claim: the deprivation of a right secured by the Constitution or laws of the United States, which was caused by a person acting under color of state law. *See Ellison v. Garbarino*, 48 F.3d 192, 194 (6th Cir. 1995).

1. Substantive Due Process Claim

Substantive due process is "[t]he right not to be subject to 'arbitrary or capricious' action by a state either by legislative or administrative action." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992). Proving a violation of substantive due process requires not only that the challenged state action was arbitrary and capricious, but also that the plaintiff has a constitutionally protected property or liberty interest. *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir.1992). In the absence of a constitutionally protected interest, allegedly arbitrary and capricious conduct will not support a substantive due process claim. *See id.*

The Sixth Circuit applies an "entitlement test" to determine whether an alleged property right is protected by the Fourteenth Amendment. *Andreano v. City of Westlake*, 2005 WL 1506049, *5 (6th Cir. June 23, 2005). Under that test, a protectable property right exists only if a plaintiff has a "legitimate claim of entitlement" or a "justifiable expectation" in the approval of his Plan. *Triomphe Investors*, 49 F.3d at 202-03; *Silver*, 966 F.2d at 1036; *G.M. Eng'rs & Assocs., Inc. v. W. Bloomfield Twp.*, 922 F.2d 328, 331

(6th Cir.1990) (finding that if defendants had the discretion to deny plaintiff's zoning application regardless of whether Plaintiff complied with certain minimum, mandatory requirements, then plaintiff has no "legitimate claim of entitlement" or "justifiable expectation" in the approval of its applications). This Court must apply state zoning laws to determine whether a legitimate claim of entitlement or a justifiable expectation exists. *See Silver*, 966 F.2d at 1036 (citing *Roth*, 408 U.S. at 577).

A plaintiff lacks a legitimate claim of entitlement or justifiable expectation if a municipality has discretion under its zoning code to deny the plaintiff's land-use application despite the application's compliance with the code's minimum requirements. *Triomphe*, 49 F.3d at 202-03; *Silver*, 966 F.2d at 1036 ("if the Board had discretion to deny the plaintiff the conditional zoning certificate [for the use the plaintiff sought], even if he complied with certain minimum mandatory requirements, then he did not have a 'legitimate claim of entitlement' or a 'justifiable expectation' in the approval of his plan."). In *Silver*, this Court held that a municipal zoning board retained sufficient discretion to deny a conditional use permit application that fully complied with a zoning statute's minimum requirements where the statute provided that an application could be approved so long as it was "desirable." 966 F.2d at 1036. Similarly, a statute providing that "a special use permit may be granted" afforded the zoning board in *Triomphe* sufficient discretion to deny a special use permit application despite the application's compliance with the statute. *See* F.3d at 203.

Plaintiff asserts a protected property right in the applied for zoning certificate, as well as the PUD Plan and the corresponding WCC Development Standards. Applying the above "entitlement test," however, the Court finds that Plaintiff has set forth no evidence showing that it has a protected property interest in either.[32] The Liberty Township Zoning Resolution grants the Commission broad discretion to determine whether to grant or deny applications for zoning permits. *See* Liberty Township Zoning Resolution § 25.03 (2002).[33] Nothing in the Zoning Resolution

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[32] The Court notes that Defendants have cited cases holding that a plaintiff's substantive due process claim is subsumed by its Fifth Amendment takings claim. *See Banks v. City of Whitehall*, 344 F.3d 550 (6th Cir. 2003); *Montgomery v. Carter City, Tennessee*, 225 F.3d 758 (6th Cir. 2000). The Court finds the aforementioned cases distinguishable, however, because Plaintiff has not alleged a taking. *See, e.g.*, *Pearson*, 961 F.2d at 1217 (considering plaintiff's substantive due process challenge to defendant's zoning where no taking was alleged); *Tri-Corp. Mgmt. Co. v. Praznik*, 33 Fed. Appx. 742, 747 (6th Cir.2002) (same).

[33] Section 25.03, "Procedure for Obtaining Zoning Certificate," provides, in relevant part:

> No Zoning Certificate shall be issued by the Township Zoning Inspector until the Zoning Certificate Application shows that the property is being or is to be used in complete conformity with this Zoning Resolution and the official Zoning Map. . . No Zoning Certificate shall be issued by the Township Zoning Inspector until the Applicant for said Zoning Certificate has submitted a Plot Plan of the area upon which the Applicant's use or structure is proposed. Said Plot Plan shall show the type or proposed use, structural dimensions at the ground, lot dimensions, side, front and rear yard setbacks, compliance with all applicable development standards and a signed

states that an applicant is automatically entitled to a requested zoning permit. Further, though Plaintiff asserts that Defendants unlawfully applied the January 19 Instructions' floating cap to deny its zoning permit application, the Zoning Inspector based her denial on a number of reasons, many of which were unrelated to the January 19 Instructions. *See* Ex. B.[34]

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statement that said Applicant will conform with all Zoning Regulations then in force for said area.

See Liberty Township Zoning Resolution § 25.03 (2002).

[34] In addition to the Zoning Inspector's finding the requested certificate of appropriateness did not comply with the floating cap set forth in the January 19 Instructions, the Zoning Inspector based her denial of Plaintiff's permit application on the following:

> a. The [WCC] Development Plan requires the rear setback for this subarea (Subarea 3) to be the 100' wide power easement. is not identified on the site plan . . . so it is not ermine compliance with this requirement.
>
> b. Section 25.03 of the Zoning Resolution requires that the site plan show structural dimensions at the ground. No structural dimensions are provided on the site plan which has been submitted.
>
> c. Section 21.17 of the Zoning Resolution regulates fences. There is an 8' high screen wall shown on the plans, 55 feet from the west property line . . . This does not comply with Section 21.17 of the Resolution, but does meet the requirements of 14.07 A (requires that all uses within this zoning district be enclosed within a structure or screened from view by fences and/or landscaping).
>
> d. The southeast area of the site plan . . . is blank. The development plan requires that all yards be landscaped. In

Because Plaintiff has not established a legitimate claim of entitlement to a zoning permit, nor a justifiable expectation that the Zoning Inspector would issue the permit, it has no property interest that could support a substantive due process claim.

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order to be complete, the site plan needs to show the proposed use and improvements in this area.

e. Section 21.12 of the Zoning Resolution regulates driveway construction. Paragraph (A)(8) of Section 21.12 requires a minimum curve radius of all driveways of 50 feet. We cannot determine from the submission which has been made whether or not this requirement is met. The plans lack this required information.

f. Section 21.12(C)(1) of the Resolution requires a minimum aggregate paving base in all driveway areas of 10 inches. Page 4 of 11 of the submitted plan shows an 8" aggregate base. This is not compliant.

g. Section 21.12(2) of the Resolution states the maximum driveway grade at any point over its entire length, is 10%. Driveway grades are provided only at the entrances from public roads (page 4 of 11). No information is provided for driveway grades within the rest of the site.

h. Section 21.05(A)(1) of the Resolution requires fully-shielded cut-off style light fixtures. The light fixtures shown on Pg. 10 of 11 of the plan do not comply

i. The drawings show fountain lights on Pg. L2.02 of the drawings, located in both ponds (pg. L2.04). No details are provided for the type of light fixtures proposed for use in these locations. All fixtures must comply with Section 21.05, and that compliance must be shown on the materials submitted to this office.

See Ex. B. at 2-3.

The Court notes that even if Plaintiff *did* have a protected property interest in its requested zoning permit, it has failed to show that the Zoning Inspector's denial of its permit application was "arbitrary and capricious." *See Tri-Corp. Mgmt. Co.*, 33 Fed. Appx. at 747; *Pearson*, 961 F.2d at 1217; *see also Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928) (holding that a court should not interfere with local zoning decisions unless the locality's action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense") (internal quotation marks and citation omitted). The Zoning Inspector denied Plaintiff's permit applications because Plaintiff failed to comply with a number of elements of the Liberty Township Zoning Resolution beyond the floating cap, and the record does not suggest that the denial was unwarranted. Accordingly, Defendants' and Intervenor's Motions to Dismiss count one of Plaintiff's Complaint is **GRANTED**.[35]

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[35] Plaintiff also relies on a number of Sixth Circuit cases to argue that its substantive due process rights were violated because the Zoning Inspector's illegal denial of Plaintiff's permit application amounted to an illegal act that "shocks the conscience." *See, e.g., Bell v. Johnson*, 308 F.3d 594, 610 (6th Cir. 2002) (addressing the issue of a prisoner's claim of retaliation," the "shocks the conscience" test was the appropriate legal standard for Bell's claim). The Court finds Plaintiff's assertion to be without merit. Actions that "shock the conscience" are those that government officials may not take "no matter what procedural protections accompany them." *Wilson v. Beebe*, 770 F.2d 578, 586 (6th Cir. 1985). While the Sixth Circuit has questioned the continued vitality of this strand of substantive due process jurisprudence, it nevertheless recognizes it in the exclusive context of cases involving *physical abuse*. *See Braley v. City of Pontiac*, 906 F.2d

2. Procedural Due Process Claim

The Court now turns to Plaintiff's procedural due process claim. The Fourteenth Amendment provides, in part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest." *See, e.g., Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001) ("Courts have long recognized that the Fourteenth Amendment requires that an individual who is deprived of an interest in liberty or property be given notice and a hearing.").

Only after a plaintiff has met the burden of demonstrating that he possessed a protected property or liberty interest and was deprived of that interest will the court consider whether the process provided to the plaintiff in conjunction with the deprivation, or lack thereof, violated his rights to due process. *Hamilton v. Myers*, 281 F.3d 520, 529 (6th Cir. 2002); *LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1108 (6th Cir.1995) ("[I]n a section 1983 due process claim for deprivation of a property interest, a plaintiff first must show a protected property interest, and only after satisfying this first requirement can a plaintiff prevail by showing that " 'such interest was abridged without appropriate process.'"). Property interests protected by the due process clause must be more than abstract desires for or attractions to a

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220, 225 (6th Cir. 1990). This is clearly not a physical abuse case to which the "shocks the conscience" standard applies.

benefit. *See Roth*, 408 U.S. at 577. The due process clause protects only those interests to which one has a "legitimate claim of entitlement." *Id.* This has been defined to include "'any significant property interests . . . including statutory entitlements.'" *Brotherton*, 923 F.2d 477, 480 (6th Cir. 1991) (citations omitted). As previously stated, property interests are not created by the Fourteenth Amendment, rather they are created and defined by independent sources, such as state law. *See id.* at 480 (quoting *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709). State supreme court decisions are controlling authority for such determinations. *See id.*; *Hamilton v. Myers*, 281 F.3d 520, 529 (6th Cir. 2002).

This Court previously found that Plaintiff does not have a bona fide property interest in the zoning permit it seeks. *See supra* Part IV.B.1. Plaintiff asserts, however, that it has an actionable liberty interest in Defendants' drafting and adoption of the January 19 Instructions. First, though Defendants assert that the January 19 Instructions constitute a legislative act to which procedural due process requirements are inapplicable, Plaintiff counters that procedural due process requirements apply because the January 19 Instructions are administrative. Second, while Defendants contend that the January 19 Instructions do not alter zoning within the boundaries of the WCC because they merely state the original intent of the 1991 WCC PUD Plan, Plaintiff argues that the Instructions function as an amendment to the PUD

Plan, and, by extension, to the Liberty Township Zoning Resolution.[36]

The Court must consider whether the January 19 Instructions are legislative or administrative in nature. In Ohio, the power of a board of township trustees to enact zoning regulations is a legislative function delegated to townships by the General Assembly. *Tuber v. Perkins*, 216 N.E.2d 877 (Ohio 1966). Defendants assert that because they were enacted by the Commission, the January 19 Instructions constitute a legislative act, to which procedural due process requirements do not apply. Plaintiff argues, however, that the January 19 Instructions are administrative, entitling Plaintiff to notice and an opportunity to contest them before they were issued. *See* Pl.'s Opp. to Defs.' Motion at 26.

In Ohio, the test for determining whether an action is legislative or administrative "is whether the action taken is one enacting a law, ordinance or regulation already in existence." *Donnelly v. Fairview Park*, 233 N.E.2d 500 (Ohio 1968) (refusal of city council to approve plan for re-subdivision of land which complied with terms of existing zoning ordinance was an administrative act rather than an unreviewable legislative act, and there was a statutory right to appeal, from the refusal to approve, to the court of common pleas); *see B-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (even though an individual's property rights may be affected

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[36] *See supra* note 11 (explaining that the January 19 Instructions represented an effort by the Commission to clarify the details of the WCC Development Standards filed in 1992).

by legislative action, "[w]here a rule of conduct applies to more than a few people, it is impracticable that everyone should have a voice in its adoption"); *see also*, *Pickney Bros., Inc. v. Robinson*, 1999 WL 801513, at *4 (6th Cir. Sept. 30, 1999) ("Governmental determinations of a general nature that affect all equally do not give rise to a due process right to be heard. But, when a relatively small number of persons are affected on individual grounds, the right to a hearing is triggered."); *Neinast v. Bd. of Trustees of the Columbus Metro. Library*, 346 F.3d 585, 597 (6th Cir. 2003) ("Governmental determinations of a general nature that affect all equally do not give rise to a due process right to be heard.") (internal citations omitted).

Based on the above inquiry, the January 19 Instructions are administrative and subject to procedural due process requirements. The Court finds it telling that in issuing the January 19 Instructions, the Commission did not adhere to the detailed amendment procedure set forth in section 519.12 of the Ohio Revised Code or the procedure set forth in the Liberty Township Zoning Resolution.[37] *See* OHIO REV.

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[37] Section 519.12, "Amendments to zoning resolution; procedure; referendum; form of petition; filing requirements," states, in part:

> (A)(1) Amendments to the zoning resolution may be initiated by motion of the township zoning commission, by the passage of a resolution by the board of township trustees, or by the filing of an application by one or more of the owners or lessees of property within the area proposed to be changed or affected by the proposed amendment with the township zoning commission. The board of township trustees may require that the owner or lessee of property filing an application to amend the zoning resolution pay a fee to defray the cost of advertising, mailing, filing with the county recorder, and

CODE § 519.12; *see also*, Liberty Township Zoning Resolution, Art. XXVII (2002). Defendants cannot assert that the Instructions constitute legislation, while at the same time, undisputedly failing to adhere to valid state procedure for enacting such legislation. Further, although Defendants assert that the January 19 Instructions are intended to affect *all* future WCC development equally, the Instructions refer directly to Plaintiff's controversy with Liberty Township. *See* Ex. K at 1 ("During the past two months, we have faced a significant controversy regarding proposed additional commercial development in the [WCC] development and in Liberty Township, generally."). Accordingly, the Court finds specious, Defendants' argument that the Instructions were merely an effort by the Commission to set forth that which had been intended in the drafting of the 1992 WCC Development

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other expenses. If the board of township trustees requires such a fee, it shall be required generally, for each application. The board of township trustees, upon the passage of such a resolution, shall certify it to the township zoning commission.

(2) Upon the adoption of a motion by the township zoning commission, the certification of a resolution by the board of township trustees to the commission, or the filing of an application by property owners or lessees as described in division (A)(1) of this section with the commission, the commission shall set a date for a public hearing, which date shall not be less than twenty nor more than forty days from the date of the certification of such a resolution, the date of adoption of such a motion, or the date of the filing of such an application. Notice of the hearing shall be given by the commission by one publication in one or more newspapers of general circulation in the township at least ten days before the date of the hearing.

OHIO REV. CODE § 519.12.

Standards, rather than an effort to thwart Plaintiff's planned Wal-Mart.[38] Defendants allowed construction within the WCC to occur for thirteen years before finding it necessary to "clarify" the WCC Development Standards, and the Court finds it noteworthy that they chose to do so only *after* Plaintiff had submitted its first variance application for its proposed Wal-Mart.

Second, the Court must consider Defendants' argument that the January 19 Instructions, rather than amending the WCC Development Standards, merely put into writing that which had been intended by the parties when the WCC Development Standards were filed with the Commission in 1992. Defendants' claims are unpersuasive. The Court previously found that the evidence available at this stage of the litigation suggests that the PUD Plan has *not* expired. *See supra* Part IV.A.2.a. Pursuant to that Plan, subarea 3 was zoned for an approximately 220,000 square foot commercial development. *See* Ex. F. Though, in form, the January 19 Instructions appear to be guidelines on which the Commission is to base its future administration of WCC's zoning and development, in function, the Instructions effectively amend the PUD Plan (and by extension the Liberty Township Zoning Resolution) to eliminate the possibility of any "big-box" retailers from developing within the WCC. After the January 19 Instructions were issued by the Commission, no further commercial development could occur in the WCC without undergoing a two-step major modification process and getting approval from the WCC architectural review

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[38] *See supra* note 11.

committee, procedural requirements that had not been in place in the thirteen years prior.

Finding that Plaintiff has a liberty interest in the January 19 Instructions, therefore, the Court must next consider whether Defendants' deprivation of Plaintiff's liberty interest contravened notions of due process. A plaintiff can establish a procedural due process claim through one of two methods: "(1) [by] demonstrating that [he] is deprived of property as a result of [an] established state procedure that itself violates due process rights; or (2) by proving that [d]efendants deprived [him] of property pursuant to a 'random and unauthorized act' and that available state remedies would not adequately compensate for the loss." *Macene v. MJW, Inc.*, 951 F.2d 700, 706 (6th Cir. 1991). Established state procedure refers to "the mechanism that effects a deprivation or contributes to cause a deprivation." *See Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 199 (6th Cir. 1987). "A plaintiff alleging the first element of this test would not need to demonstrate the inadequacy of state remedies." *Moore v. Bd. of Educ. of Johnson City Sch.*, 134 F.3d 781, 785 (6th Cir.1998). If the plaintiff pursues the second line of argument, he must navigate the rule of *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), which holds that a state may satisfy procedural due process with only an adequate post-deprivation procedure when the state action was "random and unauthorized." *See Macene*, 951 F.2d at 706; *see also Zinermon v. Burch*, 494 U.S. 113, 128 (1990) (narrowing *Parratt* to only those situations where pre-deprivation process would have been impossible or impractical). In this context, "unauthorized" means that the official in question did not have the power or

authority to effect the deprivation, not that the act was contrary to law. *See id.* at 138.

Plaintiff has a valid procedural due process claim under the first prong of *Macene*.[39] Defendants' enactment of the January 19 Instructions, in effect, an amendment to the WCC Development Plans and the Liberty Township Zoning Code, took place without regard to established amendment procedures set forth by Ohio law, and/or the Liberty Township Zoning Resolution. Based on the facts alleged, the January 19 Instructions appear to be Defendants' attempt to prohibit Plaintiff's requested zoning permit without having to face the potential problems that could occur if Township residents and developers were given a say in the matter. For thirteen years, the WCC PUD Plan had set subarea 3 as an approximately 220,000 square foot commercial lot. After the January 19 Instructions were issued, however, the size of any potential commercial development on that lot shrunk far below the originally allotted square footage. Defendants cannot unilaterally change the future of the WCC without providing the public with both notice and an opportunity to debate such a change. Therefore, the Court **DENIES** Defendants' and Intervenor's Motions to Dismiss count two of Plaintiff's Complaint.

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[39] Plaintiff also asserts a procedural due process claim under the second prong, claiming that because available state procedures do not enable it to collect money damages on its claims, it has sufficiently pled inadequate state remedies. Defendants disagree. Because the Court finds merit to Plaintiff's first prong claim, it need not reach the state remedies issue.

3. Void-for-Vagueness Claim

"The 'void-for-vagueness doctrine' is embodied in the due process clauses of the fifth and fourteenth amendments." *D.C. and M.S. v. City of St. Louis, Mo.*, 795 F.2d 652, 653 (8th Cir.1986). A vague regulation is constitutionally infirm in two significant respects. First, the doctrine of vagueness "incorporates notions of fair notice or warning," and a regulation "violates the first essential of due process of law" by failing to provide adequate notice of prohibited conduct. *See Smith v. Goguen*, 415 U.S. 566, 572 (1974); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (citations omitted); *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 556 (6th Cir.1999) ("A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."). In short, a regulation is void-for-vagueness if it "forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Connolly*, 269 U.S. at 391. Second, the void-for-vagueness doctrine prevents arbitrary and discriminatory enforcement. *Goguen*, 415 U.S. at 573. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application" *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Generally, courts have found that "[v]agueness challenges to statutes not threatening First Amendment interests are examined in light of the

facts of the case at hand." *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 292 (6th Cir. 1997) (citing *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)). In other words, the statute must be judged on an as-applied basis, and a facial challenge before the statute has been applied is premature. *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *United States v. Hofstatter*, 8 F.3d 316, 321 (6th Cir.1993).

The Court finds that Plaintiff's vagueness challenge states a claim on which relief may be granted. Plaintiff makes an "as applied" challenge to Liberty Township's Zoning Resolution and the WCC Development Standards, asserting that insofar as Defendants' applied the floating cap in considering Plaintiff's zoning permit application, the Resolution and the Development Standards "are not written with sufficient definiteness such that ordinary persons can understand what conduct is prohibited or permitted." *See* Complaint ¶ 46. Further, the Zoning Inspector cited the January 19 Instructions as one reason for her denial of Plaintiff's permit applications, making those Instructions, and their incorporation into the Township's zoning laws, a cause of Plaintiff's injury. Finally, Plaintiff's injury will likely be addressed by a favorable decision by the Court in that Plaintiff seeks an order enjoining Defendants from enforcing the purported floating cap against Plaintiff. Complaint

at19.[40] Accordingly, Defendants' Motion to Dismiss count three of Plaintiff's Complaint is **DENIED**.

4. Equal Protection Claim

In count four of the Complaint, Plaintiff alleges that Defendants' conduct violated the Equal Protection clause of the Fourteenth Amendment, which prohibits

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[40] Plaintiff also notes that according to *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250 (6th Cir.1994), it could have attacked the January 19 Instructions on their face. In *Springfield Armory*, the Sixth Circuit found that the district court's review of a City of Columbus ordinance "on an as applied basis" was, in the circumstances of that case, "an erroneous way to approach the vagueness problem," because the ordinance banning certain assault weapons was obviously vague on its face. *Id.* at 254. In *Springfield Armory, Inc.*, the ordinance defined "assault weapons" by naming forty-six individual models of rifles, shotguns and pistols, listed by model name and manufacturer. Added to the prohibition against these weapons was the following phrase: "other models by the same manufacturer with the same action design that have slight modifications or enhancements of firearms listed . . . provided the caliber exceeds .22 rimfire." *Id.* at 252. The *Springfield Armory* court found that the term "slight modifications" was unconstitutionally vague, making the ordinance facially invalid. *Id.* at 254. In *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272 (6th Cir. 1997), however, the Sixth Circuit distinguished *Springfield Armory*, as a special case. The *Magaw* court noted that a facial challenge was appropriate because: (1) the *Springfield Armory* court did not consider justiciability requirements of Article III; and (2) as the court was reviewing a city ordinance, not a federal statute enacted by Congress, it did not have to consider whether there had been "final agency action" in regard to an interpretation of the provision alleged to be vague. *Id.* at 292. Because the Court will consider Plaintiff's "as applied" vagueness challenge, however, it need not consider whether *Springfield Armory* or *Magaw* is more analogous to the instant case.

a state from denying equal protection of the laws to any person within its jurisdiction. *Warren v. City of Athens*, 411 F.3d 697, 708 (6th Cir. 2005); *see Buckles*, 2002 WL 193853. Defendants urge the Court to dismiss this claim because Plaintiff has failed to allege that he was a member of a suspect class and that he was treated differently from other similarly situated individuals.

The standard of review given to an equal protection claim depends on the classification involved. In the case sub judice, Plaintiff does not claim to be a member of a protected class. Rather, Plaintiff is proceeding under the "class of one" theory annunciated in *Village of Willowbrook v. Olech*, 528 U.S. 1073, 1074 (2000). To succeed under a "class of one" theory, Plaintiff must show that it was treated "differently from others similarly situated and that there is no rational basis for such difference in treatment." *See Warren*, 411 F.3d at 710 (finding that plaintiffs failed to establish that there was no rational basis for defendants' zoning decision); *Buckles*, 2002 WL 193853, at *13.

Plaintiff asserts that it is a "developer of commercial property in the [WCC], and [is] thus similarly situated to the other developers of commercial property in the WCC." *See* Pl.'s Opp. to Defs.' Motion at 35. Moreover, Plaintiff argues that it was denied equal protection of the laws because other WCC developers have received the benefit of Liberty Township's "anything goes" zoning for the past thirteen years. *Id.* at 35-36. Specifically, Plaintiff contends that in order to discriminate against Plaintiff's proposed Wal-mart store, Defendants enacted the floating cap and required formal review by

the WCC architectural review committee for the first time. Pl.'s Opp. to Intervenor's Motion at 40. Defendants counter that Plaintiff's conclusory assertions fail to state a claim on which relief can be granted. The Court agrees.

Plaintiff has failed to allege a valid equal protection claim because it has not provided evidence suggesting that the other allegedly similarly situated developers submitted commercial land use proposals to the Commission that would exceed the purported floating cap, let alone that these other developers were granted approval of such proposals. *See Buckles*, 2002 WL 193853, at *13 (noting that "[a]n equal protection claim simply cannot exist absent an allegation that *compared to others*, the plaintiff was treated less favorably."). Thus, Defendants' and Intervenor's Motions to Dismiss count four of Plaintiff's Complaint is **GRANTED**.

5. State Law Claims

In counts five through eight of the Complaint, Plaintiff asserts substantive due process, procedural due process, vagueness, and equal protection claims pursuant to Ohio law. These claims are governed by essentially the same standards as those applicable to Plaintiff's federal constitutional claims. *See Warren v. City of Athens, Ohio*, 411 F.3d 697, 704, n.6 (6th Cir. 2005) (citing *Sorrell v. Thevenir*, 633 N.E.2d 504, 511-12 (Ohio 1994)). Accordingly, insofar as the Court dismissed Plaintiff's federal law claims, Plaintiff's corresponding state claims are also dismissed. Thus, the Court **GRANTS** Defendants' and Intervenor's Motions as to counts five and eight of Plaintiff's

Complaint, and **DENIES** the Motions as to counts six and seven.

6. Declaratory Judgment

As noted *supra*, count nine of Plaintiff's Complaint states a claim for declaratory relief. *See* Complaint ¶¶ 89-91. The Court has denied Defendants' and Intervenor's Motions to dismiss counts two, three, six and seven at this time. Until those claims are resolved, however, Plaintiff's claim for declaratory relief remains viable. Accordingly, the Court **DENIES** Defendants' and Intervenor's Motion to Dismiss count nine.

V. CONCLUSION

For the foregoing reasons, Defendants' and Intervenor's Motions are **GRANTED** in part and **DENIED** in part. The Court **GRANTS** Defendants' and Intervenor's Motions as to counts one, four, five, and eight of Plaintiff's Complaint. The Court **DENIES** Defendants' and Intervenor's Motions as to counts two, three, six, seven and nine of Plaintiff's Complaint. Counts one, four, five, and eight of Plaintiff's Complaint are hereby dismissed with prejudice.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: October 12, 2006

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-4446

[Filed August 31, 2010]

WEDGEWOOD LIMITED PARTNERSHIP I,	)
Plaintiff-Appellee,	)
v.	)
TOWNSHIP OF LIBERTY, OHIO, ET AL.,	)
Defendants-Appellants.	)

ORDER

BEFORE: GRIFFIN and KETHLEDGE, Circuit Judges; and CARR,* District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of

* Hon. James G. Carr, Chief United States District Judge for the Northern District of Ohio, sitting by designation.

this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Carr would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX E

Constitutional provisions, statutes, and municipal ordinances:

The Due Process Clause of the Fourteenth Amendment:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property without due process of law; ....

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within, the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

Liberty Township Zoning Resolution §25.03 (2002):

> No Zoning Certificate shall be issued by the Township Zoning Inspector until the Zoning Certificate Application shows that the property

is being or is to be used in complete conformity with this Zoning Resolution and the official Zoning Map ... No Zoning Certificate shall be issued by the Township Zoning Inspector until the Applicant for said Zoning Certificate has submitted a Plot Plan of the area upon which the Applicant's use or structure is proposed. Said Plot Plan shall show the type or proposed use, structural dimensions at the ground, lot dimensions, side, front and rear year setbacks, compliance with all applicable development standards and a signed statement that said Applicant will conform with all Zoning Regulations then in force for said area.

APPENDIX F

LIBERTY TOWNSHIP

Board of Trustees
7761 N. Liberty Road
Powell, Ohio 43065

TRUSTEES
Robert E. Cape, DVM
Kim Cellar
John C. Werner

CLERK
Marcia Rush

LIBERTY TOWNSHIP BOARD OF TRUSTEES

January 19, 2004

PUBLIC STATEMENT AND INSTRUCTIONS TO ZONING DEPARTMENT REGARDING FUTURE ADMINISTRATION OF WEDGEWOOD COMMERCE CENTER DEVELOPMENT PLAN

During the past two months, we have faced a significant controversy regarding proposed additional commercial development in the Wedgewood Commerce Commercial Center development, and in Liberty Township, generally. We are issuing this public statement for the purpose of better advising our constituants, including our valued residents, land owners, developers, and current and future entrepreneurs, of several positions that we believe are

appropriate, and warranted, with respect to the controversies that have arisen. This statement will constitute our instructions to our zoning department with respect to the administration of the development plans and zoning regulations which currently apply in Wedgewood Commerce Center, and in other developments in Liberty Township.

Before turning to our specific findings and instructions, we need to express our sincere gratitude to Holly Foust, our Zoning Inspector, and her staff. These township employees have gone above and beyond the call of duty to respond to citizen and developer inquiries, document requests, and requests that we have made for information, analysis and input. We are truly fortunate to employ such a dedicated and competent zoning staff.

On a general basis, we have certainly heard our constituents' requests and desires to do what is possible to deter excessive and regional types of commercial development in our community. As a Board we, like other residents in our community, are interested in employing our current regulations, and developing and adopting new regulations, to avoid, as possible, and limit, where possible, the burdens that "big box" types of retail facilities place upon the infrastructure of our community. Frankly, as a Board we believe that although any comprehensive land use plan or zoning code will always be capable of improvement, our plan and code have been working well, and provide a solid basis for continued positive development. Our Zoning Commission and Board of Trustees are and will continue to work diligently to implement improvements to the plan and the code,

wherever they are warranted, and we appreciate the input of our citizens in these continuous projects.

Turning to the current status of the Wedgewood Commerce Center development, this development was approved as a Planned Commercial District in 1991. Without doubt, the extensive negotiations which permitted this development to proceed, and allowed this property to remain in Liberty Township, resulted in a development plan which is less than perfect. The plan reflects compromises, and lacks definition in several important areas. In addition, changes and modifications which have occurred over time in the administration of the development plan have rendered the current administration of the plan complex.

At the center of the current controversy is a series of documents created and generated in the last few days of the zoning process, in the late fall of 1991. The Resolution which approved the rezoning is specific in its reference to incorporated documents. However, changes of personnel in our zoning office, file reorganizations, the use of these files over time, and modifications made during the twelve (12) years that the plan has been in effect, has made identification of the incorporated documents, and interpretation of the ultimate meaning of the documents, difficult Notwithstanding these difficulties, based upon the work which has been done we as a Board have reached several conclusion.

Before articulating our conclusions and administrative instructions, we do need to note that we recognize that the method available for a "final" determination of the meaning of the plan, as amended, is the difficult litigation process. As we all know,

litigation is expensive, uncertain, and disruptive. We recognize and appreciate the fact that the positions that we have decided must be taken may be challenged. However, in order to avoid the expense, uncertainty, and disruption of litigation, we encourage our constituents to continue to do the best they can to work with us, to administer the laws that apply, and the policies that are warranted in our community, in a manner of which meets need for a balancing of interests.

Extensive review and analysis of the Wedgewood Commerce Center development plan, the minutes of the meetings which led to the approval of that plan, the policies that have been followed to date in administering that plan, and the discernable intent of all of the parties expressed during the conception and the process which led to the approval of the plan, has led us to conclude that the ultimately adopted plan imposed a "floating" maximum of 500,000 sq. ft of "commercial" development in the Wedgewood Commerce Center. We have found evidence of the establishment of this limit in a number of different documents. Moreover, we have found no documents or proof through amendment processes which modified this "overall" square footage cap, as best as we can conclude. The subject of whether or not an acreage "cap" also applies has been more difficult. On the one hand, the documents clearly show that such a cap was contemplated and negotiated, and is reflected in several different drawings, text and supporting documents. Unfortunately, however, the documents that exist are at least arguably inconsistent with respect to the starting point of the cap and acreage basis. Moreover, amendments and changes requested and, in some cases, approved over the years, may or

may not have had the impact of suggesting or modifying the acreage cap.

In any event, tonight we are distributing a detailed analysis prepared by our zoning department of construction and development in the Wedgewood Commerce Center, using the categories identified in the development plan. In the development of this analysis, the lack of definition of the various categories of permissible uses has imposed a challenge, and unfortunately, at least at bit of uncertainty.

The analysis reveals that the commercial development completed to date, and substantially through the approval process, has consumed most of the commercial square development completed to date, and substantially through the approval process, has consumed most of the commercial square footages imposed by the development plan an overall cap. The analysis also reveals that, on an acreage basis, commercial development to date has exceeded at least two of the acreage figures evidenced in the documents which constitute the development plan, as amended.

Under these circumstances, we have determined that, except for a few modest projects which have already completed the two-step "major" administrative review process, all additional applicants seeking to construct retail or other arguable "commercial" development in the Wedgewood Commerce will be required to seek approval as a "major" plan of modification. In other words, we are instructing our zoning department to refrain from issuing zoning certificates for any additional commercial development in the Wedgewood Commerce Center, to issue such permits only after an approval through the "two-step"

major process has been completed. Each process will be considered to be an application to consume any remaining portion of the square footage limitation, or exceed that limitation, and as a modification to expand the acreage limitation which we believe has been met.

Furthermore, we conclude that the negotiated plan required an architectural review (design review) board and process which, in our view, has not been constituted or operated as contemplated. Accordingly we had instructed our Zoning commission to appoint a representative to the Design Review Board for the Wedgewood Commerce Center, and we will be appointing a citizen representative to that Board following the release of this statement. The job of that Board will be to make sure that all additional development in the Wedgewood Commerce Center, including the developments currently in the review process, meet all of the requirements of the plan and code, as amended, and contribute to the attractiveness of the development.

Of course, we recognize that this statement does not cover all of the details and nuances likely to be encountered as our zoning department continues to work to properly apply not only the Wedgewood Commerce development plan, but also the plans for the Big Bear Farms mixed use development, and other commercial and potential commercial developments in Liberty Township. It is our intent to remain active and open as these issues, arise, and require resolution. Moreover, we invite discourse and dialog, and not litigation, with those who have interests in the positions that we have decided must be taken, for we believe that cooperation is possible, and in the best interests of all parties.

Respectfully,

Liberty Township Board of Trustees

Local Gov't\LIBERTY\Liberty-Wedgewood (Public Statement).doc

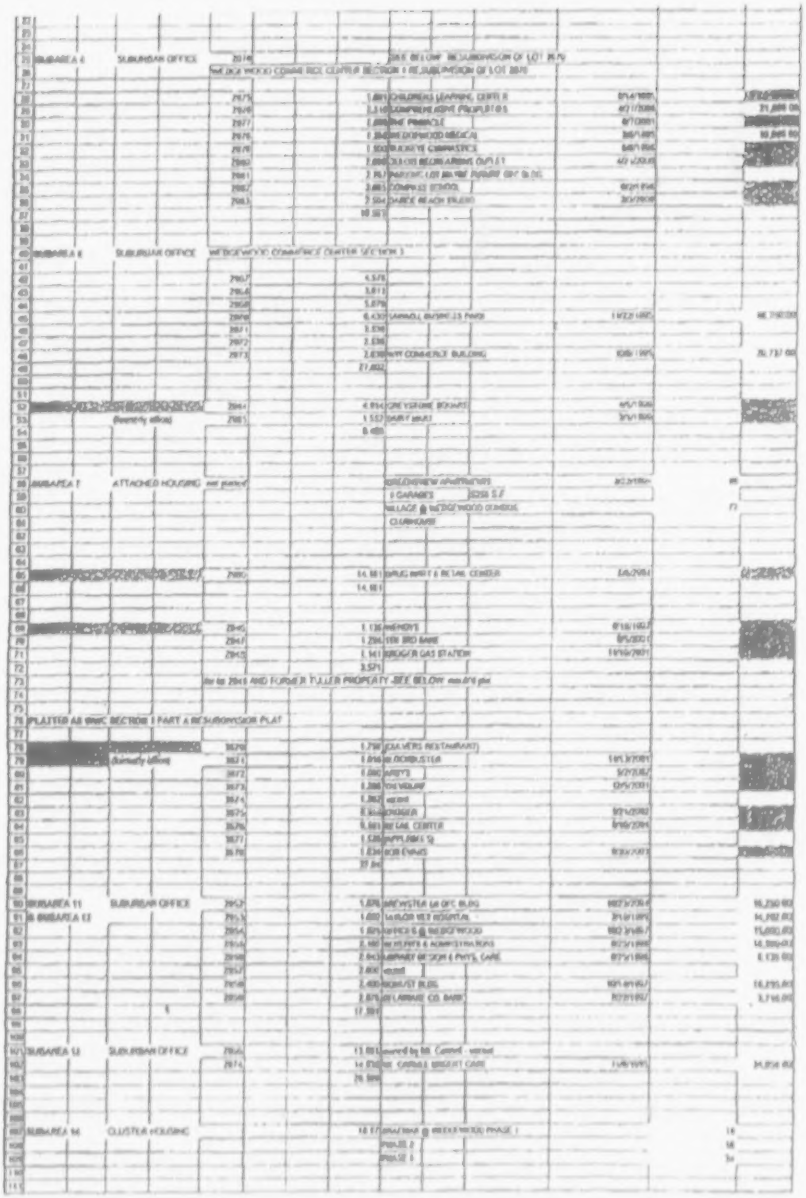
ZONING CERTIFICATES ISSUED TO DATE

[*Fold-out Exhibits, see next 2 pages*]

ZONING CERTIFICATES ISSUED TO DATE

BY SUBAREA, BY CATEGORY, BY LOT, AND BY USE

				PLATTED AS:			VALUE	ZONING	PERMIT DATE		UNITS	SQ FT
	SUBAREAS 1 AND 2											



	SUBAREA 4	SUBURBAN OFFICE	7914			ZONE (BELOW) RE-SUBDIVISION OF LOT 7879						
			THE EDGEWOOD COMMERCE CENTER SECTION 1 RE-SUBDIVISION OF LOT 7879									
				7975		1,881	CHILDREN'S LEARNING CENTER		07/14/2000			
				7976		3,240	COMPREHENSIVE PHYSICIANS		07/17/2000			21,600.00
				7977		1,800	THE PINNACLE		07/2001			
				7978		1,800	THE DOGWOOD GROUP		08/1/2001			10,800.00
				7979		1,800	BUCKEYE COMMERCE		08/1/2000			
				7980		1,800	OHIO RECREATIONAL SUPPLY		07/1/2000			
				7981		2,700	PARKING LOT FOR THE DOGWOOD OFFICE BLDG.					
				7982		2,880	COMPASS SCHOOL		07/1/2000			
				7983		2,500	CHOICE REACH SALES		10/1/2000			
						18,801						
	SUBAREA 8	SUBURBAN OFFICE	THE EDGEWOOD COMMERCE CENTER SECTION 1									
				7967		4,575						
				7968		3,811						
				7969		5,879						
				7970		6,430	LANDOLL BUSINESS PARK		11/22/1997			46,740.00
				7971		3,636						
				7972		2,636						
				7973		2,636	NEW COMMERCE BUILDING		10/8/1999			26,737.00
						27,402						
			7964			4,954	ONE YEARNE BOWLS		9/5/1996			
		(formerly office)	7965			1,557	BARLY WORLD		3/1/1996			
						6,511						
	SUBAREA 7	ATTACHED HOUSING	not platted				BUILDING NEW APARTMENTS		8/2/1996		80	
							1 GARAGES	3256 S.F.				
							VILLAGE @ THE DOGWOOD CONDOS				72	
							CLUBHOUSE					
			7980			14,161	DRUG MART & RETAIL CENTER		1/6/2000			
						14,161						
			7964			1,136	MEMORY		8/10/1997			
			7967			1,296	TEN 3RD BANK		8/5/2000			
			7972			1,141	KROGER GAS STATION		10/16/2001			
						3,573						
			Re-to 7964 AND FURTHER TYLER PROPERTY SEE BELOW not platted yet									
	PLATTED AS ONE SECTION 1 PART A RESUBDIVISION PLAT											
			7978			1,798	OLIVERS RESTAURANT					
		(formerly office)	7971			1,896	DOBBS 1518		1/6/2000			
			7972			1,800	ARBYS		9/2/2002			
			7973			1,288	THE VILLAGE		09/1/2001			
			7974			1,862	WENDY					
			7975			5,000	KROGER		9/1/2002			
			7976			5,661	DENTAL CENTER		8/10/2004			
			7977			1,680	APPLEBEE'S					
			7978			1,234	BOB EVANS		8/30/2001			
						22,841						
	SUBAREA 11	SUBURBAN OFFICE	7962			1,836	BROWSTER DENTAL OFFICE BLDG		10/2/2000			16,250.00
	SUBAREA 12		7963			1,800	MAJOR HILL HOSPITAL		3/1/1999			44,102.00
			7964			1,836	OFFICE BUILDING @ THE DOGWOOD		8/2/1997			15,600.00
			7965			2,160	OFFICE & ADMINISTRATION		8/2/1999			14,399.00
			7966			2,843	LIBRARY OF SCIENCE & PHYS. CARE		8/2/1999			8,139.00
			7967			1,800	vacant					
			7968			2,400	DENTIST BLDG.		10/1/1997			16,235.00
			7969			1,876	LANDMARK CO. BANK		8/2/1999			3,746.00
						17,391						
	SUBAREA 13	SUBURBAN OFFICE	7970			11,861	owned by Mr. Cottrell - vacant					
			7971			14,870	STATE CARDIOLOGIST CARE		1/6/1999			34,854.00
						26,866						
	SUBAREA 14	CLUSTER HOUSING				18,571	APARTMENTS @ EDGEWOOD PHASE I				18	
							PHASE 2				18	
							PHASE 3				36	

	A	B	C	D	E	F	G	H	I	J	K	L	M	N
112														
113														
114	SUBAREA 16		CLUSTER HOUSING		2961			14.391	HAMPTONS @ WEDGEWOOD			UNDER	57	
115									CONDOS			CONSTRUCTION		
116														
117	SUBAREA 16	*	CLUSTER HOUSING		2951			12.247	BARRINGTONS @ WEDGEWOOD			UNDER	40	
118									CONDOS			CONSTRUCTION		
119														
120	SUBAREA 17		CLUSTER HOUSING		2930			11.389	BISHOPS GATE			UNDER	39	
121				*part of lot 2930 was transferred to lot 3675 for Kroger					CONDOS			CONSTRUCTION		
122														
123				TOTAL ACRES		249.607								
124				(ACRES OF SUBAREA 7 UNKNOWN, ACRES IN RIGHT-OF-WAY UNKNOWN.)										
125														
126	[redacted]													
127														
128	RESIDENTIAL UNITS							ACRES					DENSITY	
129	OFFICE IN OFFICE SUBAREA							43.057						758 UNITS
130	[redacted]													230,485.00 SQ FT
131	[redacted] IN OFFICE SUBAREA													
132	[redacted] INCLUDES 15.56 ACRES FORMER													
133	[redacted]													
134								60.989						326,974.00 SQ FT
135	ADD:													
136		commercial in office			2968			4.404	World Gym	in process			33,356	
137		[redacted]			3677	(formerly office)		1.525	Applebee's	in process			5,065	
138		[redacted]			3670	(formerly office)		1.759	Culvers	in process			5,324	
139		commercial in commercial			3675	(formerly office)		na	Kroger	(approved future construction)			19,890	
140														
141	TOTALS													
142	RESIDENTIAL UNITS													
143	OFFICE IN OFFICE SUBAREA							43.057						758 UNITS
144	[redacted]													230,485.00 SQ. FT.
145	[redacted] IN OFFICE SUBAREA							[redacted]					[redacted]	
146	[redacted] DATE							68.678						390,511.00 SQ. FT.

Case: 2:04-cv-01069-ALM-EPD Doc #: 13-15 Filed: 12/17/04 Page: 5 of 5 PAGEID #: 352

APPENDIX G

LIBERTY TOWNSHIP

Zoning
7761 N. Liberty Road
Powell, Ohio 43065

TRUSTEES
Robert E. Cape, DVM
Kim Cellar
John C. Werner

INSPECTOR
Holly C. Foust

September 30, 2004

Wedgewood Limited Partnership
Attn: Charles J. Ruma
209 East State Street
Columbus, Ohio 43215

Subject: Decision Denying Application for Zoning Permit Filed June 29, 2004

Dear Mr. Ruma:

We are writing this letter to formally notify you as the designated representative of Wedgwood Limited Partnership, that the Application for Zoning Permit filed on June 29, 2004, and seeking approval for the construction of a Retail/Grocery facility and a Gas Station facility (identified in the drawings that you submitted as a Wal Mart Supercenter and a Murphy

Oil USA Inc. facility) at Lot No. 2069 of Wedgwood Commerce Center, Section #1, is **DENIED**.

This Application for Zoning Permit cannot be approved, as submitted, for numerous reasons. These reasons include, without limitation, the following:

1. The Development Plan for Wedgewood Commerce Center remains incomplete, because at no time has this office received a revised Development Plan and Plat which in all respects conforms to the representations and commitments made at the meeting of the Liberty Township Board of Trustees which occurred on November 18, 1991, and at the hearings which preceded that final hearing. As you know, the applicant for the current application is an entity that is closely related to the entity which sought and obtained the rezoning of the land which is now the Wedgwood Commerce Center, and the principals of these entities are directly responsible for the lack of performance in producing and filing a revised Development Plan which was promised.

2. The request for approval does not meet either the documented or the promised and agreed upon requirement of the currently effective Development Plan applicable to the Wedgwood Commerce Center Planned Commercial Zoning District. In the context of the amount of commercial development already constructed and allowed in the Wedgewood Commerce Center, the proposed construction would exceed the maximum allowable commercial acreage and square footage limitations that were expressly made a part of the development plan. The effectiveness of these limitations, together with a statement of Liberty Township's calculations as to the acreage and square

footage status as of that date, are set forth in the Public Statement and Instructions to Zoning Department adopted by the Liberty Township Board of Trustees on January 19, 2004. Those materials are made a part of this decision by this reference. It is the position of the Township that the limitations can be varied or modified only through the legislative process that is available under the Liberty Township Zoning Resolution.

3. The application is incomplete because it does not include the required approval of the Wedgewood Commerce Center Architectural Review Committee.

4. The application is incomplete, internally inconsistent, and at variance with the requirements of Resolution and the Wedgewood Commerce Development Plan in many different respects. The following is a summary of the problems noted to date:

With respect to the Wal Mart Supercenter Plans:

a. The Wedgewood Commerce Center Development plan requires the rear setback for this subarea (Subarea 3) to be the 100' wide power easement. This easement is not identified on the site plan (pg. 3 of 11), so it is not possible to determine compliance with this requirement.

b. Section 25.03 of the Zoning Resolution requires that the site plan show structural dimensions at the ground. No structural dimensions are provided on the site plan which has been submitted (page 3 of 11).

c. Section 21.17 of the Zoning Resolution regulates fences. There is an 8' high screen wall shown on the plans, 55 feet from the west property line (on page 3 of 11). This does not comply with Section 21.17 of the Resolution, but does meet the requirements of 14.07 A (requires that all uses within this zoning district be enclosed within a structure or screened from view by fences and/or landscaping).

d. The southeast area of the site plan (page 3 of 11) is blank. The development plan requires that all yards be landscaped. In order to be complete, the site plan needs to show the proposed use and improvements in this area.

e. Section 21.12 of the Zoning Resolution regulates driveway construction. Paragraph (A) (8) of Section 21.12 requires a minimum curve radius of all driveways of 50 feet We cannot determine from the submission which has been made whether or not this requirement is met. The plans lack this required information.

f. Section 21.12 (C) (1) of the Resolution requires a minimum aggregate paving base in all driveway areas of 10 inches. Page 4 of 11 of the submitted plan shows an 8" aggregate base. This is not compliant.

g. Section 21.12 (2) of the Resolution states the maximum driveway grade at any point over its entire length, is 10%. Driveway grades are provided only at the entrances from public roads (page 4 of 11). No information is provided for driveway grades within the rest of the site.

h. Section 21.05 (A) (1) of the Resolution requires fully-shielded cut-off style light fixtures. The light fixtures shown on Pg. 10 of 11 of the plan do not comply.

i. The drawings show fountain lights on Pg. L2.02 of the drawings, located in both ponds (pg. L2.04). No details are provided for the type of light fixtures proposed for use in these locations. All fixtures must comply with Section 21.05, and that compliance must be shown on the materials submitted to this office.

With respect to the plans entitled MURPHY OIL USA INC.:

a. Site plan, Pg. C 2: structural dimensions at the ground are not shown, as required by Section 25.03 of the Resolution. There is a note "C" on that drawing page, which states that the canopy will be 24' x 164'. This is inconsistent with other information in the drawings, as noted below. Additionally, the size of the kiosk under the canopy is not provided This is required information.

b. Site Plan Pg. C 3 gives canopy size as 24' x 179.17'. This is inconsistent with other information in the drawings. In fact, two other canopy sizes are given on two other pages of the drawings.

c. Pages C2 and C3: No dimensions for the dumpster enclosure are provided. This is information that is required

d. Page EC-2: canopy size is disclosed as 180' x 24'. Other dimensions are given on 2 other pages.

e. Page CS-1 indicates that the modular building size = 7'2" x 34'0". Dimensions are not on site plan. This information is required.

f. Page A-2: modular building exterior construction materials are 20 GA pre-finished exterior wall panels. Is this some type of metal? Approved exterior construction materials in Wedgewood Commerce Center are stone, brick, stucco, and wood.

g. Page A-3: modular building roof material = 20 GA galvanized roof deck. At this time, I do not believe any flat metal roof structures exist in Wedgewood Commerce Center. It is the position of this office that this does not fit in with the surrounding area, and does not conform with the requirements of the Development Plan. However, of course, this is an issue for the Architectural Review Committee, which has not yet received an application for consideration.

h. Page E 1: The exterior kiosk lights are not fully-shielded, cut-off-style, down-lighting fixtures as required by the Resolution.

i. Page YD-1 G: It appears that the applicant is proposing to install outdoor vending machines (ATM, Ice Machine, Air/Vac). Such outdoor vending machines are not a permitted

use under the Resolution, or the Development Plan.

j. Page YD-1 G. The dumpster location shown does not appear to be the same location shown on other pages. Accordingly, the plans are not internally consistent.

k. Page YD-1 G. The dimensions of the kiosk are labeled as 7' x 34'. These are not the same dimensions shown on page CS-1. Accordingly, again, the plans are inconsistent.

l. Page YD-5: The driveway details do not show the required minimum 10" aggregate depth of base for commercial driveways.

m. Page YD-5: The drawings show a chain link fence around the dumpster enclosure. There is a letter taped to this page, dated June 7, 2004 from Scott Foster to Rosalinda Childers, which states "all subsequent drawings will reflect the changes described above." Those changes included changing the chain link fence to a wood CMU enclosure with a wood gate. Those changes are not reflected on the plans submitted to the zoning office. Furthermore, the plans do not disclose what CMU material is. That disclosure is required in order for this office to assess compliance, (in terms of approved exterior building materials, which are stone, brick, stucco, and wood). Additionally, the plans do not disclose the proposed color of this enclosure, which is a required disclosure.

n. Page YD-5: Flexible safety fence detail: The drawings do not adequately define or describe what is meant by "OSHA safety fencing." Furthermore, the drawings do not disclose whether or not this fencing is proposed for the construction period, only, or whether or not this is proposed permanent fencing. If it is intended that this fencing be permanent, more information is needed, including information regarding materials and color.

o. Page YD-5. The "Typical Wal Mart Lighting Pole Base Detail" portion of this drawing states, "Match Existing Wal-Mart light fixture per site". This is not an adequate disclosure. In order to be approved, the applicant is required to submit details, including disclosure of the proposed type of light fixture and the proposed installation height.

p. Page YD-6 G: The lights proposed to be attached to the underside of the canopy do not comply with Section 21.05 of the Resolution.

As noted above, this letter simply describes the deficiencies noted with respect to the submittal in the review conducted to date. Several of the deficiencies are not capable of being resolved without approvals through the administrative review process, or by the issuance of variances. Under these circumstances, this office must deny the permit request

Pursuant to Section 519.15 of the Ohio Revised Code and Article XXVIII of the Liberty Township Zoning Resolution, this decision may be appealed to the Liberty

Township Board of Zoning Appeals by filing, within 20 days after this decision, with this office and with the Board of Zoning Appeals, a notice of appeal specifying the grounds for the appeal.

Date: September 30, 2004

/s/ Holly Foust
Holly Foust
Liberty Township Zoning Inspector

cc Bruce Ingram, Esq.
Liberty Township Board of Trustees

APPENDIX H

**IN THE COURT OF COMMON PLEAS,
DELAWARE COUNTY, OHIO**

**Case No. 05CV-F-02-101
Judge W. Duncan Whitney**

[Filed September 22, 2005]

WEDGEWOOD LIMITED PARTNERSHIP I,	)
Appellant,	)
v.	)
LIBERTY TOWNSHIP BOARD OF ZONING APPEALS,	)
Appellee.	)

DECISION AND ENTRY

This case is before this Court following the July 18, 2005 hearing that was held by this Court. At the hearing, two issues were addressed, 1) the legal basis for the 500,000 square foot limit for commercial development in the Wedgewood Commerce Center Plan Development ("WCC"); and 2) whether the Planned Unit Development ("PUD") Plan had expired by the time Appellant Wedgewood Limited Partnership

I ("Wedgewood") had submitted its application for a zoning permit. At the conclusion of the hearing, it was evident to this Court that a proper decision could not be made without having evidence as to the basis of the zoning inspector's decision in denying Wedgewood's application for a zoning permit; evidence as to the legal basis of the 500,000 square foot commercial limit with the WCC; and evidence as to the affect of the original PUD Plan for the WCC. This Court requested that the parties submit memoranda regarding the issue of remanding this case to the Liberty Township Board of Zoning Appeals to determine the basis of the zoning inspector's decision. Both parties, as well as the Amici Curiae, submitted memoranda on that issue to this Court.

When hearing an appeal pursuant to Chapter 2506 of the Ohio Revised Code, the common pleas court is limited to the record and cannot consider additional evidence unless it appears on the face of the transcript that "[t]he transcript does not contain a report of all evidence admitted or proffered by the appellant." R.C. 2506.03(A)(1). See also, *Dvorak v. Municipal Civil Service Commission* (1976), 46 Ohio St.2d 99, 346 N.E.2d 157; *Ray v. Unemployment Compensation Bd. of Rev.* (4th Dist. 1993), 85 Ohio App.3d 103, 619 N.E.2d 106. In an appeal filed pursuant to R.C. Chapter 2506, where the filed transcript contains gaps and omissions, the complaining parties must demonstrate that there is a reasonable likelihood that the outcome may have been different had additional evidence been introduced. *Ray,* supra at 108, citing *Franklin Twp. v. Marble Cliff* (10th Dist. 1982), 4 Ohio App.3d 213, 447 N.E.2d 765.

"It is axiomatic that an administrative agency cannot reach an informed decision when it fails to consider all pertinent evidence. It is also axiomatic that an administrative agency must accept and include all relevant evidence presented by the parties." *Ray*, supra at 108. As such, an administrative agency cannot erroneously prepare an incomplete record and then take advantage of an error that it has created. *Id.* Additionally, where an administrative agency errs reaching a decision without considering all relevant evidence, a reviewing court cannot be expected to review the decision of the administrative agency when vital information is missing. *Id.* at 109. "[W]hen an administrative agency certifies a record to the court of common pleas, and it appears that the decision was reached without consideration of evidence submitted to it but not included in the record, and that evidence may reasonably affect the decision of the agency, the court must remand the matter to the agency to permit it to carry out its role as the finder of fact." *Id.*

In this case, vital information is missing from the Liberty Township Board of Zoning Appeals ("BZA") record that was submitted to this Court. Scarce, if any, testimony or exhibits were contained within the record that resolved questions pertaining to the basis of the zoning inspector's decision to deny Wedgewood's application for a zoning certificate. Further, the record was also devoid of evidence as to the legal basis of the 500,000 square foot commercial limit imposed upon the WCC; and evidence as to the affect of the originally approved PUD plan for the WCC on the commercial limit. As such, it appears that the BZA decision may have been reached without consideration of these crucial questions. It also has been demonstrated that such evidence may have reasonably affected the BZA's

decision. Accordingly, this Court must remand this matter to the BZA to carry out its role as the finder of fad to determine the basis of the zoning inspector's decision, as well as provide documentation of the legal basis for the 500,000 square foot commercial limit on the Wedgewood Commerce Center Plan Development and the affect of the original Planned Unit Development Plan. Therefore, this case is hereby REMANDED to the Liberty Township Board of Zoning Appeals.

/s/ W. Duncan Whitney
W. DUNCAN WHITNEY, JUDGE

* * *

[*Certificate of Service Omitted from Printing of this Appendix*]

APPENDIX I

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

Case No. 05-CAH-10-00068

JUDGES:
William B. Hoffman, P.J.
Julie A. Edwards, J.
John F. Boggins, J.

[Filed January 8, 2007]

WEDGEWOOD LIMITED PARTNERSHIP I	)
	)
Plaintiff-Appellant	)
	)
-vs-	)
	)
LIBERTY TOWNSHIP BOARD OF ZONING APPEALS	)
	)
Defendant-Appellee	)

OPINION

CHARACTER OF PROCEEDING:
Civil Appeal From Delaware County Court
Of Common Pleas Case
No. 05CV-F-02-101

JUDGMENT:
Dismissed

DATE OF JUDGMENT ENTRY:
07 JAN - 8AM 11:26

APPEARANCES:

For Plaintiff-Appellant

BRUCE INGRAM
JOSEPH MILLER
VORYS, SATER, SEYMOUR
AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43215-1008

For Defendant-Appellee

WILLIAM L. LOVELAND
LOVELAND & BROSIUS
50 W. Broad St., Suite 3300
Columbus, Ohio 4321 5

CRAIG B. PAYNTER
CHESTER, WILLCOX & SAXBE
65 East State Street, Suite 1000
Columbus, Ohio 43215-4213

Edwards, J.

{¶1} Plaintiff-appellant Wedgewood Limited Partnership I appeals from the September 22, 2005 Decision and Entry of the Delaware County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} In November of 1991, the Liberty Township Board of Trustees adopted a resolution approving the rezoning of 345 acres of land from farm residential to a "Planned Commercial District", which is a type of Planned Unit Development. At the same time, the trustees approved and adopted regulations applicable to the newly- zoned Wedgewood Commerce Center. Such regulations, which are titled "Wedgewood Commerce Center Development Standards," were filed in February of 1992.

{¶3} The Wedgewood Commerce Center Development Standards divide the Planned Commercial District into seventeen (17) separate subareas within the Wedgewood Commerce Center. Each of the subareas is designated for a specific use, including, among others, "Suburban Office", "Attached Housing" and "Commercial." Only Subareas 3, 8 and 9 were designated for commercial use.

{¶4} The "Subarea Development Criteria" for subarea 3 provides that the gross building area for such subarea is 220,857 square feet. In turn, the "Subarea Development Criteria" for subarea 8 states that the gross building area for such subarea is 144,553 square feet while the criteria for subarea 9

provides that the gross building area for such subarea is 134,520 square feet. Thus, the combined total gross commercial building area is 500,000 square feet. The Wedgewood Commerce Center Development Standards also required establishment of an architectural review committee.

{¶5} Following the adoption of the development plan for the Planned Commercial District, Liberty Township issued zoning certificates allowing commercial use in subareas that were designated for "suburban office" use rather than for commercial use.

{¶6} Subarea 3 of the Wedgewood Commerce Center, which was platted in 1994 as Lot 2069 and comprises approximately 34 acres, has been owned by appellant Wedgewood Limited Partnership I since 1991. In October of 2003, appellant submitted an application for certain variances from the Liberty Township Zoning Resolution in order to construct Wal-Mart Super Center on Lot 2069, but later withdrew its application.

{¶7} Thereafter, on January 19, 2004, the Liberty Township Board of Trustees issued a "Public Statement and Instructions to Zoning Department Regarding Future Administration of Wedgewood Commerce Center Development Plan" to address the "significant controversy regarding proposed additional commercial development in the Wedgewood Commerce Commercial Center development and in Liberty Township, generally." The trustees, in such document, interpreted the development plan as imposing a "floating" maximum of 500,000 square feet of commercial development in the Wedgewood Commerce Center. The Liberty Township Board of Trustees, in

such document, further stated, in relevant part, as follows:

{¶8} "Extensive review and analysis of the Wedgewood Commerce Center development plan, the minutes of the meetings which led to the approval of that plan, the policies that have been followed to date in administering that plan, and the discernable intent of all of the parties express during the conception and the process which led to the approval of the plan, has led us to conclude that the ultimately adopted plan imposed a 'floating' maximum of 500,000 sq. ft. of 'commercial' development in the Wedgwood Commerce Center. We have found evidence of the establishment of this limit in a number of different documents. Moreover, we have found no documents or proof through amendment processes which modified this 'overall' square footage cap, as best as we can conclude. . . .

{¶9} "The analysis reveals that the commercial development completed to date, and substantially through the approval process, has consumed most of the commercial square footages imposed by the development plan as an overall cap. The analysis also reveals that, on an acreage basis, commercial development to date has exceeded at least two of the acreage figures evidenced in the document which constitute the development plan, as amended.

{¶10} "Under these circumstances, we have determined that except for a few modest projects which have already completed the two-step 'major' administrative review process, all additional applicants seeking to construct retail or other arguable 'commercial' development in the Wedgewood

Commerce will be required to seek approval as a 'major' plan of modification. In other words, we are instructing our zoning department to refrain from issuing zoning certificates for any additional commercial development in the Wedgwood Commerce Center, to issue such permits only after an approval through the 'two-step' major process has been completed. Each process will be considered to be an application to consume any remaining portion of the square footage limitation, or exceed that limitation, and as a modification to expand the acreage limitation which we believe has been met."

{¶11} The Liberty Township Board of Trustees, in its "public statement," further concluded that "the negotiated plan required an architectural review (design review) board and process which, in our view, has not been considered or operated as contemplated."

{¶12} Thereafter on June 29, 2004, appellant submitted two separate applications for zoning permits to Liberty Township. The first application was for the retail/grocery component of the proposed Wal-Mart Super Center and indicated that the building area was 220,598 square feet. The second application was for a Murphy Oil gas station at the proposed Wal-Mart site and indicated that the building area was 243 square feet.

{¶13} As memorialized in a letter dated September 30, 2004, the Liberty Township Zoning Inspector denied the two applications on four grounds. The Liberty Township Zoning Inspector specifically found that the development plan for Wedgewood Commerce Center "remains incomplete, because at no time has this office received a revised Development Plan and

Plat which in all respects conforms to the representations and commitments made at the meeting of the Liberty Township Board of Trustees which occurred on November 18, 1991, and at the hearings which preceded that final hearing." The Zoning Inspector further found that the proposed construction "would exceed the maximum allowable commercial acreage and square footage limitations that were expressly made a part of the development plan" and that the applications did not "include the required approval of the Wedgewood Commerce Architectural Review Committee." Finally, the Zoning Inspector found that the applications were "incomplete, internally inconsistent, and at variance with the requirements of Resolution and the Wedgewood Commerce Development Plan in many different respects." The deficiencies in the plans were specifically enumerated in the Zoning Inspector's letter.

{¶14} In response, appellant, on October 20, 2004, hand-delivered a letter to the Zoning Inspector dated October 20, 2004 from appellant's treasurer indicating that appellant was withdrawing that portion of its application relating to the Murphy Oil gas station. Appellant's treasurer, in such letter, referenced an attached letter from its engineering firm, CESO Engineers and Surveyors, which addressed the concerns that the Zoning Inspector had raised in her September 30, 2004, letter.

{¶15} On or about October 19, 2004, appellant filed a Notice of Appeal from the Zoning Inspector's September 30, 2004, decision with appellee Liberty Zoning Board of Zoning Appeals. Appellant, in its appeal, alleged that the Zoning Inspector was incorrect

and had acted improperly in determining that the Development Plan for Wedgewood Commerce Center was incomplete and in her determination that the proposed construction would exceed the maximum square foot limitations. Appellant also alleged that the Zoning Inspector was incorrect in holding that a zoning certificate could not be issued because there was no approval by the architectural review board and in finding that the application was incomplete.

{¶16} A public hearing was held on November 16, 2004. On January 11, 2005, the Board of Zoning Appeals adopted a document titled "Findings of Fact and Conclusions of Law" that affirmed the decision of the Zoning Inspector.

{¶17} Subsequently, on February 8, 2005, appellant filed a Notice of Appeal from the Board of Zoning Appeals' decision with the Delaware County Court of Common Pleas pursuant to R.C. 2506.01. The record of the proceedings before the Liberty Township Board of Zoning Appeals was filed with the trial court on March 18, 2005.

{¶18} On March 28, 2005, appellant filed a motion seeking to supplement the record with additional evidence, arguing that the record did not contain all of the "township's documents and other evidence that were relied upon by the township's zoning inspector and the BZA in denying the application for a zoning certificate." Appellant, in its motion, specifically alleged that the missing documents were the basis for the trustee's imposition of a "floating cap" on commercial development and a "two step" approval process and both the Zoning Inspector's decision and

the decision of the Board of Zoning Appeals affirming the same.

{¶19} Pursuant to a Decision and Entry filed on May 13, 2005, the trial court denied appellant's motion, finding that "questions and concerns regarding certain documents and procedures should have been addressed at the hearing below and because they were not, this Court is unable to permit the record to be supplemented."

{¶20} The parties filed briefs in the trial court and a hearing was held on July 18, 2005. At the hearing, the trial court stated, in relevant part, on the record as follows:

{¶21} "The Court: Counsel, let me tell you where I'm coming from so that you know what I really want you to address today. The two major issues as far as this court is concerned is one, what is the legal basis of the five hundred thousand square foot limit, and two, what are the facts as to whether or not the P.U.D. approved back in '92 expired or not." Transcript of July 18, 2005 hearing at 3.

{¶22} At the conclusion of the hearing, the trial court indicated on the record that it was thinking of remanding the matter to the Board of Zoning Appeals for additional evidence and asked the parties to file briefs addressing the issue of whether or not the trial court had the authority to do so. After briefs were filed by the parties, the trial court, pursuant to a Decision and Entry filed on September 22, 2005, remanded the matter to the Liberty Township Board of Zoning Appeal. The trial court, in its Decision and Entry, stated, in relevant part, as follows:

{¶23} "In this case, vital information is missing from the Liberty Township Board of Zoning Appeals ('BZA') record that was submitted to this Court. Scarce, if any, testimony or exhibits were contained within the record that resolved questions pertaining to the basis of the zoning inspector's decision to deny Wedgewood's application for a zoning certificate. Further, the record was also devoid of evidence as to the legal basis of the 500,000 square foot commercial limit imposed upon the WCC; and evidence as to the affect of the originally approved PUD plan for the WCC on the commercial limit. As such, it appears that the BZA decision may have been reached without consideration of these crucial questions. It also has been demonstrated that such evidence may have reasonably affected the BZA's decision. Accordingly, this Court must remand this matter to the BZA to carry out its role as the finder of fact to determine the basis of zoning inspector's decision, as well as provide documentation of the legal basis of the 500,000 square foot commercial limit on the Wedgewood Commerce Center Plan Development and the affect of the original Planned Unit Development Plan. Therefore, this case is hereby REMANDED to the Liberty Township Board of Zoning Appeals."

{¶24} Appellant now appeals from the trial court's September 22, 2005 Decision and Entry, raising the following assignments of error on appeal:

{¶25} "I. THE COURT OF COMMON PLEAS ERRED BY REMANDING THIS ADMINISTRATIVE APPEAL TO THE BOARD OF ZONING APPEALS IN ORDER TO CONSIDER ADDITIONAL EVIDENCE AND BY NOT ENTERING JUDGMENT IN FAVOR OF PLAINTIFF-APPELLANT WHERE THE RECORD

BEFORE THE BZA WAS COMPLETE ON THE ISSUE OF THE NONEXISTENCE OF A 'FLOATING CAP' ON COMMERCIAL DEVELOPMENT AND, THUS, REMAND IS ONLY AN INVITATION TO CREATE EVIDENCE WHERE NONE EXISTS.

{¶26} "II. THE COURT OF COMMON PLEAS ERRED BY REMANDING THIS ADMINISTRATIVE APPEAL TO THE BOARD OF ZONING APPEALS TO CONSIDER ADDITIONAL EVIDENCE AND BY NOT ENTERING JUDGMENT IN FAVOR OF PLAINTIFF-APPELLANT WHERE THE TOWNSHIP TRUSTEES' JANUARY 19, 2004 INSTRUCTIONS, WHICH ANNOUNCED THE CREATION OF A 'FLOATING CAP' ON COMMERCIAL DEVELOPMENT THAT THE COURT OF COMMON PLEAS RECOGNIZED SERVED AS THE PRIMARY BASIS FOR DENIAL OF A ZONING CERTIFICATE TO PLAINTIFF-APPELLANT, WERE AN INVALID LEGISLATIVE ACT AND, THUS, REMAND TO CONSIDER FURTHER EVIDENCE ON THIS MATTER IS FUTILE.

{¶27} "III. THE COURT OF COMMON PLEAS ERRED BY REMANDING THIS ADMINISTRATIVE APPEAL TO THE BOARD OF ZONING APPEALS AND BY NOT ENTERING JUDGMENT IN FAVOR OF PLAINTIFF-APPELLANT SINCE THE PREPONDERANCE OF THE SUBSTANTIAL, RELIABLE, AND PROBATIVE EVIDENCE DOES NOT SUPPORT THE DENIAL OF A ZONING CERTIFICATE TO PLAINTIFF-APPELLANT BECAUSE PLAINTIFF-APPELLANT'S APPLICATION FOR A ZONING CERTIFICATE COMPLIED WITH ALL REQUIREMENTS OF THE DEVELOPMENT PLAN AND JANUARY 19, 2004

INSTRUCTION ISSUED BY THE TOWNSHIP TRUSTEES ARE ILLEGAL, UNCONSTITUTIONAL, AND UNENFORCEABLE.

{¶28} "IV. THE COURT OF COMMON PLEAS ERRED BY REMANDING THIS ADMINISTRATIVE APPEAL TO THE BOARD OF ZONING APPEALS AND BY NOT ENTERING JUDGMENT IN FAVOR OF PLAINTIFF-APPELLANT SINCE THE JANUARY 19, 2004 INSTRUCTIONS AND DENIAL OF PLAINTIFF-APPELLANT'S APPLICATION FOR ZONING CERTIFICATE ON THE BASIS OF THOSE INSTRUCTIONS VIOLATED PLAINTIFF-APPELLANT'S RIGHT TO DUE PROCESS OF LAW.

{¶29} "V. THE COURT OF COMMON PLEAS ERRED BY REMANDING THIS ADMINISTRATIVE APPEAL TO THE BOARD OF ZONING APPEALS AND BY NOT ENTERING JUDGMENT IN FAVOR OF PLAINTIFF-APPELLANT SINCE THE TOWNSHIP IS BARRED BY EQUITABLE ESTOPPEL AND LACHES FROM ENFORCING A 'FLOATING CAP' ON COMMERCIAL DEVELOPMENT THAT TAKES INTO ACCOUNT DEVELOPMENTS APPROVED IN SUBAREAS DESIGNATED IN THE DEVELOPMENT PLAN FOR 'SUBURBAN OFFICE' USE.

{¶30} "VI. THE COURT OF COMMON PLEAS ERRED BY REMANDING THIS ADMINISTRATIVE APPEAL TO THE BOARD OF ZONING APPEALS AND BY NOT ENTERING JUDGMENT IN FAVOR OF PLAINTIFF-APPELLANT SINCE THE PREPONDERANCE OF THE SUBSTANTIAL, RELIABLE, AND PROBATIVE EVIDENCE DOES NOT SUPPORT THE DENIAL OF A ZONING

CERTIFICATE TO PLAINTIFF-APPELLANT BECAUSE: PLAINTIFF-APPELLANT'S APPLICATION FOR ZONING CERTIFICATE COMPLIED WITH ALL TECHNICAL ASPECTS OF THE ZONING RESOLUTION; THE DEVELOPMENT PLAN DOES NOT REQUIRE THE APPROVAL OF AN ARCHITECTURAL REVIEW COMMITTEE FOR A ZONING CERTIFICATE TO BE ISSUED; PLAINTIFF-APPELLANT DID NOT CONSENT TO COMMERCIAL DEVELOPMENT IN SUBAREAS DESIGNED IN THE DEVELOPMENT PLAN FOR 'SUBURBAN OFFICE' USE; AND NO MODIFICATION OF THE DEVELOPMENT PLAN IS NECESSARY FOR PLAINTIFF-APPELLANT TO BE ENTITLED TO A ZONING CERTIFICATE."

{¶31} In turn, appellee raises the following assignment of error on cross-appeal:

{¶32} "I. THE COURT OF COMMON PLEAS ERRED BY REMANDING THIS ADMINISTRATIVE APPEAL TO THE BOARD OF ZONING APPEALS TO CONSIDER ADDITIONAL EVIDENCE, AND BY NOT ENTERING JUDGMENT IN FAVOR OF DEFENDANT-APPELLEES, WHERE ALL OF THE EVIDENCE IN THE RECORD DEMONSTRATES THAT AS A MATTER OF LAW THE DECISIONS OF THE TOWNSHIP ZONING INSPECTOR AND THE TOWNSHIP BOARD OF ZONING APPEALS AFFIRMING THE ZONING INSPECTOR'S DECISION WERE CONSTITUTIONAL AND LAWFUL, AND SUPPORTED BY ALL OF THE SUBSTANTIAL, RELIABLE, AND PROBATIVE EVIDENCE ON THE RECORD AS A WHOLE."

{¶33} However, before addressing the merits of the assignments of error, we must first address whether the September 22, 2005 Decision and Entry of the Delaware County Court of Common Pleas is a final, appealable order.[1]

{¶34} Ohio law provides that appellate courts have jurisdiction to review only final orders or judgments. See, generally, Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505 .02. If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and it must be dismissed.

{¶35} Revised Code 2505.02 states, in relevant part, as follows:

{¶36} "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶37} "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶38} "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

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[1] Previously, this Court, pursuant to a Judgment Entry filed on February 21, 2006, denied appellees' Motion to Dismiss for lack of a final appealable order. However, such finding was subject to reconsideration. See, for example, *Tabbaa v. Koglman*, Cuyahoga App. No. 83215, 2004-Ohio-2706 and *Hayes v. White*, Columbiana App. No. 01 CO 00, 2001-Ohio-3467.

{¶39} "(3) An order that vacates or sets aside a judgment or grants a new trial;

{¶40} "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶41} "(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶42} "(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶43} "(5) An order that determines that an action may or may not be maintained as a class action;

{¶44} "(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code."

{¶45} In the case sub judice, appellant specifically argues that the trial court's September 22, 2005

Decision and Entry is a final appealable order pursuant to R.C. 2505.02(B)(2) and 2505.02(B)(3). We disagree.

{¶46} As is stated above, R.C. 2505.02(B)(2) provides that that an "order that affects a substantial right made in a special proceeding" is a final appealable order. A substantial right is defined as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." RC. 2505.02(A)(1). An order which affects a substantial right is one which, if not immediately appealable, would foreclose appropriate relief in the future. *Neary v. Board of Zoning Appeals* (June 30, 1999), Montgomery App. No. 17428, 1999 WL 960777, unreported at 4, citing *State v. Chalender* (1994), 99 Ohio App.3d 4, 6-7, 649 N.E 2d 1254, 1255-1256.

{¶47} We find that the order appealed from is not a final appealable order since the trial court's September 22, 2005, Decision and Entry did not preclude the possibility that appellant's application for a zoning permit would be granted on remand. In *Neary,* supra, the appellant, after three of his permits for construction of a billboard were revoked and five other permits for construction of billboard signs were denied by a Zoning Inspector, filed an appeal with the Board of Zoning Appeals. The appellant, in his appeal, requested that if the Zoning inspector's decision was upheld, he be granted variances for the eight proposed billboards. The BZA denied the appellant's applications for permits and refused his request for variances for them.

{¶48} The appellant, in *Neary*, then appealed to the Montgomery County Common Pleas Court pursuant to R.C. § 2506.01. The appellant, in his brief to the trial court, asserted five assignments of error. The appellant argued that the BZA had acted in an arbitrary, capricious, and unreasonable manner by interpreting the zoning code as limiting billboards to no more than fifty square feet in size, that the code sections relevant to the BZA's decision were unconstitutional since they had the effect of banning all billboards within the city limits of Moraine., and that the zoning code contained an unconstitutional delegation of legislative authority inasmuch as the BZA enjoyed unfettered discretion in determining whether to grant or deny variance requests. The appellant, in *Neary*, also argued that the code was being arbitrarily enforced and that the BZA should be equitably estopped from revoking the three previously granted permits.

{¶49} The Common Pleas Court sustained Neary's first assignment of error and remanded the case to the BZA with instructions to "determine what restrictions or limitations apply to Neary's billboards." The court further found the appellant's second and fifth assignments of error to be moot and overruled his third and fourth assignments of error.

{¶50} On remand, the BZA, in *Neary*, denied the appellant's request for permits and his requests for variances. The appellant then appealed.

{¶51} In *Neary*, the Second District Court of Appeals, noted, as a preliminary matter, that it had to determine whether the trial court's decision following the appellant's first appeal to that tribunal constituted a final appealable order. In holding that such decision

was not a final appealable order, the Second District Court of Appeals stated, in relevant part, as follows: "Since the trial court's first decision did not preclude the possibility of Neary's applications being granted on remand, we cannot say his substantial right to use the land, if existent, was affected by the decision. Therefore, we conclude that the [sic] neither R.C. § 2505.02(B)(1) nor (2) provide a basis for finding the trial court's first decision to be a final appealable order." Id at 4. For the same reason, we find that the trial court's September 22, 2005 Decision and Entry was not a final appealable order.

{¶52} The next issue for determination is whether the trial court's September 22, 2005 Decision and Entry was a final appealable order under R.C. 2505.02(B)(3). Appellant maintains that the trial court's remand order, in effect, grants a new trial and as such, is a final order as defined in R.C. 2505.02(B)(3). However, we find that the trial court's order does not grant a trial de novo since the trial court had not reached the merits of the case and did not render its decision on the matter. Thus, the trial court retained jurisdiction over this matter. See *Eberhard Mfg. v. Santa* (July 19, 2001), Cuyahoga App. No. 78588, 2001 WL 824454. Accordingly, the trial court's September 22, 2005 Decision and Entry is not a final appealable order pursuant to R.C. 2505.02(B)(3).

{¶53} We further note that the similar issue of whether a Court of Common Pleas order remanding a case for further hearing to the Board of Building Appeals was a final appealable order was considered in *Shaker Towers Condominium v. City of Cleveland Fire Department* (2000), 135 Ohio App. 3d 742, 735 N.E.2d

520. In such case, a condominium association appealed from a decision of the Board of Building Appeals which required it to install an elevator recall system. The trial court remanded the matter to the Ohio Board of Building Appeals for a hearing, finding that the record was incomplete. In holding that the trial court's order was not a final appealable order, the Eighth District Court of Appeals stated, in relevant part, as follows: "The order set forth above clearly does not vacate or set aside the decision of the Ohio Board of Building Appeals. It does not determine the merits of the appeal; rather, it effectively requires the board to hold a new hearing in order to create a better record for appellate review. Even though the judge indicated that the order was final, that does not determine the finality of the order under R.C. 2505.02. It is clear that the matter is still pending in her court subject to compliance with the judge's direction upon remand." Id at 745.

{¶54} Finally, while appellant cites numerous cases in support of its proposition that orders of remand to an administrative body in an administrative appeal under R.C. Chapter 2506 are final appealable orders, we find that such cases are distinguishable from this case. In *Stace Development, Inc. v. Wellington Township Board of Zoning Appeals*, Lorain App. No. 04CA008619, 2005-Ohio-4798, for example, the appellant appealed the trial court's decision reversing the BZA's denial of a zoning variance and ordering the BZA to reconsider the variance petition filed by the appellee. In *Hensel v. Board of Zoning Appeals Lake Township*, Stark App. No. 2001-CA-00046, 2001-Ohio-1377, which was decided by this Court, the trial court reversed the decision of the Board of Zoning Appeals and remanded the matter to the BZA to

consider whether or not to grant a variance. In *Perez v. City of Cleveland Bd. Of Zoning Appeals* (Jan. 13, 2000), Cuyahoga App. No. 75166, 2000 WL 23123, the appellant City of Cleveland Board of Zoning Appeals appealed from a decision by the trial court reversing the BZA's denial of a request for a change of use permit and remanding the matter to the BZA. In all of the above cases, the trial court reversed a decision made by the BZA before remanding the matter to the BZA. In other words, the trial court made a decision on the merits. The trial court in this matter did not do so.[2]

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[2] See, also, *Geisert v.* City *of Willoughby Zoning Board* (Sept. 30, 1993), Lake App. No. 93-L-020, 1993 WL 407240. In such case, the City of Willoughby Zoning Board revealed a conditional use permit and the appellant then appealed to the Court of Common Pleas. The Court of Common Pleas reversed the decision of the Zoning Board and remanded solely because the Board had failed to make findings of fact and conclusions of law.

In holding that the trial court's order was not a final appealable order, the Court, in *Geisert*, stated, in relevant part, as follows: "At this time, the trial court's order does not address the merits of whether the conditional user permit should or should not be revoked. Either appellant of appellee could prevail after the Board complies with the trial court's order. Therefore, the court's judgment does not determine the matter and prevent a judgment. *Route 20 Bowling alley, Inc.*, Lake App. No. 93-L-010, at 2; *The Lyden Company*, Lake App. No. 93-L-193 at 4-5."

In addition to our analysis that the trial court's decree does not determine the matter and prevent a judgment, it likewise does not affect a substantial right. 'Nothing in the trial court's order prevents either party from having the trial court review the [Board's] ruling once it complies with the remand directive. Additionally, either party will have the ability to appeal from the

The trial court in this matter remanded the case to the BZA for additional action by the BZA. The trial court never made a decision on the assignments of error that were before it.

{¶55} Based on the foregoing, we find that the September 22, 2005, Decision and Entry of the Delaware County Court of Common Pleas was not a final appealable order.

{¶56} The appeal and cross-appeal are, therefore, dismissed.

By: Edwards, J.

Hoffman, P.J. and

Boggins, J. concur

/s/Julie A. Edwards

/s/William B. Hoffman

/s/John F. Boggins

JUDGES

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trial court's final order once it is issued, * * * provided a timely notice of appeal is filed." *Route 20 Bowling Alley, Inc.*, at 3-4." Id. at 2.

APPENDIX J

BEFORE THE LIBERTY TOWNSHIP BOARD OF ZONING APPEALS

BZA Case No. BZAO4-28

[Filed October 23, 2008]

Wedgewood Limited Partnership I,	)
	)
Appellant,	)
	)
v.	)
	)
Holly C. Foust, Liberty Township Zoning Inspector, in her official capacity, the Liberty Township Zoning Department, and Liberty Township,	)
	)
Appellees.	)
	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Wedgewood Commerce Center is a 345-acre planned unit development, consisting of 17 subareas, located along Sawmill Parkway in Liberty Township, Delaware County, between Powell Road and the Delaware County Line (Wedgewood Limited Partnership I Exhibit ("WW Ex.") 5) (Wedgewood

Limited Partnership I also referred to herein as "Applicant" and "Appellant").

WAL-MART APPLICATION

2. On or about October 2003, Charles Ruma, on behalf of Wal-Mart and Wedgewood Limited Partnership I, submitted a request for a variance to allow for development of a 220,598 square foot Wal-Mart SuperCenter in Subarea 3 of Wedgewood Commerce Center (WW Ex. 50).

3. In December 2003, Holly Foust (Liberty Township Zoning Inspector) was instructed to, and proceeded to, compile a spreadsheet, which listed the types of uses, by subareas, that had been approved up to that point by Liberty Township in Wedgewood Commerce Center. (Foust Tr. at 497, Tab 15).

4. On January 5, 2004, Bruce Ingram, counsel for Wedgewood Limited Partnership I, sent a letter to Liberty Township Zoning Inspector withdrawing the Application for a variance. (Liberty Township Zoning Department ("Department Ex.") 48).

5. By January 2004, significant public opposition to the proposed Wal-Mart SuperCenter was evident.

6. On January 19, 2001, the Township Trustees published a document, drafted by their legal counsel, titled "Public Statement and Instructions to Zoning Department Regarding Future Administration of Wedgewood Commerce Center Development Plan" ("January 19 Instructions"). The spreadsheet commenced by Ms. Foust was finalized and released

with the January 19 Instructions. (Department Ex. 15).

7. Prior to the creation of the spreadsheet by Ms. Foust in December 2003, and prior to the preparation of the January 19 Instructions, many Township officials had assumed the construction of a Wal-Mart SuperCenter in Wedgewood Commerce Center would have been consistent with the approved development plan. (*See*, e.g., WW Ex. 35).

8. The January 19 Instructions indicated that any future proposed commercial use forecast for Wedgewood Commerce Center would be treated as a major modification to the development plan under the Township's Zoning Code.

9. The concept of, and procedure to address, major modification to the development plan were both in existence and part of the Liberty Township Zoning Code PRIOR to the issuance of the January 19 Instructions.

10. On June 29, 2004, Charles Ruma, on behalf of Wedgewood Limited Partnership, filed two Applications For Zoning Permit regarding Lot 2069 in the Wedgewood Commerce Center, Section 1 Subdivision (hereinafter, "the Applications"). The Applications sought certificates of zoning compliance for two proposed uses upon the single parcel at issue: the Applications sought approval of a retail building, consisting of a Wal-Mart SuperCenter containing 220,598 square feet of building area, and also sought approval of a 243 square-foot Murphy Oil Gas Station as an integral and included part of the development of the subject parcel. (Department Ex. 2).

11. On September 30, 2004, the Liberty Township Zoning Department and the Office of the Liberty Township Zoning Inspector, by Holly Foust, the Zoning Inspector, denied the applications. This written decision (Department Ex. 3) (hereinafter referred to as "the Decision") was specific in identifying and describing the reasons that Liberty Township could not approve the Applications, as presented. The Zoning Inspector's denial listed many reasons for denying the applications, including the following:

(1) The Development Plan for Wedgewood Commerce Center remains incomplete, because at no time has this office received a revised Development Plan and Plat which in all respects conforms to the representations and commitments made at the meeting of the Liberty Township Board of Trustees which occurred on November 18, 1991, and at the hearings which preceded that final hearing. The Applicant Wedgewood Limited Partnership I, for the current zoning application, is an entity that is closely related to the entity which sought and obtained the rezoning of the land which is now the Wedgewood Commerce Center, and is also the Appellant, and the principals of these entities are directly responsible for the lack of performance in producing and filing a revised Development Plan which was promised;

(2) The request for approval does not meet either the documented or the promised and agreed upon requirements of the currently effective Development Plan applicable to the

Wedgewood Commerce Center Planned Commercial Zoning District. In the context of the amount of commercial development already constructed and allowed in the Wedgewood Commerce Center, the proposed construction would exceed the maximum allowable commercial acreage and square footage limitations that were expressly made a pan of the development plan:

(3) The application is incomplete because it does not include the required approval of the Wedgewood Commerce Center Architectural Review Committee: and

(4) The application is incomplete, internally inconsistent, and at variance with the requirements of the Liberty Township Resolution and the standards established and applicable under the Wedgewood Commerce Development Plan in 9 detailed respects with regard to the retail building component of the Applications and in 16 ways with respect to the Murphy Oil USA component of the Applications.

12. On October 20, 2004, Wedgewood Limited Partnership I ("Appellant") filed an appeal from the September 30, 2004 decision of the Zoning Inspector with this Liberty Township Board of Zoning Appeals ("BZA").

13. On the same day that the Appellant filed this appeal, the Appellant submitted a revised site plan to the Zoning Inspector, and also tendered a letter pursuant to which Appellant attempted to withdraw

the Murphy Oil USA, Inc. component of the Applications. By these actions, and by these substantially modified and amended plans (all prepared on dates subsequent to the date of the Decision), the Applicant sought to supplement and modify the Applications to address, resolve, and potentially to eliminate many of the grounds for denial cited in the Decision.

14. Holly Foust testified that the application for Wal-Mart is severable and distinct from the application for Murphy Oil USA. (Foust Tr. at 166).

15. The Appellant's Application for the Appeal in this case (Department Ex. 4) stated:

> "The Zoning Inspector is incorrect and acted improperly in her determinations that the Development Plan for Wedgewood Commerce Center remains incomplete and that a Zoning Certificate cannot be issued for this reason."
>
> "The Zoning Inspector is also incorrect and acted improperly in her determinations that the proposed construction would exceed any maximum allowable limitations upon commercial development, that any such supposed limitations can only be varied through the legislative process that is available under the Liberty Township Zoning Resolution, and that a Zoning Certificate cannot be issued for these reasons."
>
> "The bases for the Zoning Inspector's conclusions regarding any maximum allowable limitations upon commercial development (including, but not limited to, the Public Statement and Instructions to Zoning

Department adopted by the Liberty Township Board of Trustees on January 19, 2004) are incorrect and improper."

"The Zoning Inspector is also incorrect and acted improperly in her determinations that the application for Zoning Certificate does not include architectural review approval, that the application is incomplete for this reason, and that a Zoning Certificate cannot be issued for that reason."

"The Zoning Inspector is incorrect and acted improperly in her determinations that the application is 'incomplete, inconsistent, and at variance with the requirements of Resolution (sic) and the Wedgewood Commerce Center Development Plan in many respects' and that a Zoning Certificate cannot be issued for those reasons."

FINDINGS REGARDING NOVEMBER 16, 2004 PUBLIC HEARING

16. On November 16, 2004, the BZA conducted a public hearing on the appeal. The parties were given a full and unrestricted opportunity to present evidence, call witnesses and present argument, and a complete record of the hearing was made.

17. At the BZA hearing, the Appellant restated its contention that it had withdrawn a portion of its Applications. The Appellant stated that it no longer requested a Zoning Certificate for a Gas Station at the property at issue. However, that attempted modification of the Applications did not occur until after the Zoning Department issued the Decision.

Because this appeal was taken before the attempted modification, the Zoning Department was never given an opportunity to consider the Applications as purportedly amended. The previous Decision of this BZA and this Decision have been based upon the Applications as they existed on the date of the Zoning Inspector's Decision (September 30, 2004), and not on the basis of any amended or modified Applications.

18. The Appellant presented no testimonial evidence at the November 16, 2004 BZA hearing. In fact, counsel for Appellant refused to present witness testimony or evidence, and stated that an evidentiary hearing was improper and procedurally erroneous. All that was presented by the Appellant was the argument of counsel. That argument included argument regarding factual determinations, including the content and the meaning of plans, the development of parcels other than the parcel at issue, the history of development of the Wedgewood Commerce Center, and other factual matters. The Zoning Inspector testified in her own behalf.

19. At the November 16, 2004 hearing, the Zoning Inspector and the Appellant both submitted three-ring binders containing records regarding the Wedgewood Commerce Center development. The Appellant also submitted revisions to the site plan filed with the applications, which revisions were not before the Zoning Inspector at the time she issued the September 30, 2004 denial.

20. The BZA unanimously, previously affirmed the September 30, 2004 Decision of the Zoning Inspector, as documented in its written Findings of Fact and Conclusions of Law dated January 11, 2005.

21. On appeal, the Common Pleas Court of Delaware County (Judge Whitney) determined there were gaps and omissions in the record. Accordingly, by Decision and Entry dated September 22, 2005, the Court remanded the case to the Liberty Township BZA for further proceedings to:

(a) determine the basis of the Zoning Inspector's decision;

(b) provide documentation of the legal basis for the 500,000 square feet commercial limit on the Wedgewood Commerce Center Plan Development; and

(c) provide documentation of the effect of the original Planned Unit Development Plan.

FINDINGS REGARDING REMANDED CASE

22. Following the subsequent remand from the Court of Appeals on subsequent successive appeal, neither of the parties requested a new hearing from the Liberty Township BZA for several months.

23. On or about June 6, 2007, Wedgewood Limited Partnership submitted a request to reconvene the hearing, which was scheduled by the BZA at the first available opportunity thereafter. At the request of the BZA, a status conference was convened in the Delaware County Court, on August 14, 2007, to address anticipated procedural concerns and issues with the Court.

24. Pursuant to the Order of Remand, ten evidentiary Remanded Public Hearings were held on

September 11 and 25, 2007, October 30, 2007, November 8 and 27, 2007, December 11, 2007, April 29, 2008, May 6, 2008, June 10 and 24, 2008.[1] No limitations of any kind were placed upon the parties with regard to the scope of their respective evidentiary presentations.

25. The testimony offered at each of the Remanded Public Hearings is generally summarized as follows:

(a) September 11, 2007 – Counsel for the Appellant and for Appellees, Liberty Township and the Liberty Township Zoning Inspector, presented opening statements. (Tr. at 8-31). Wedgewood LP then began its presentation and called David Dye as its first witness. David Dye was the attorney for Wedgewood LP and the other applicants who joined Wedgewood LP in seeking approval of the Wedgewood Commerce Center ("WCC") proposal in 1991. (Tr. at 32-51). Liberty Township then cross-examined Mr. Dye. (Tr. at 51-90). After redirect and re-cross examinations of Mr. Dye (Tr. at 90-107), Wedgewood LP called Liberty Township Zoning Inspector Holly Foust as on cross-examination. (Tr. at 107-130);

(b) September 25, 2007 – Wedgewood LP continued its cross-examination of Ms. Foust

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[1] Each of these Remanded Public Hearings began at 7:30 p.m. and ended at approximately 10:30 p.m. Thus, the Remanded Public Hearings included more than twenty-five hours of testimony and argument.

(Tr. at 139-197), and then called Charles Ruma (Tr. at 198-243). Mr. Ruma is and always has been the President of Wedgewood, Inc., the general partner of Wedgewood LP;

(c) October 30: 2007[2] – Wedgewood LP continued its direct examination of Mr. Ruma (Tr. at 253-290), and Liberty Township began its cross-examination of him. (Tr. at 290-358);

(d) November 8, 2007 – Liberty Township continued its cross-examination of Mr. Ruma. (Tr. at 367-473);

(e) November 27, 2007 – Wedgewood LP's third and final witness, engineer David Oakes, was not available to testify on November 27, 2007, so by agreement of the parties, Liberty Township began its direct examination of Ms. Foust. (Tr. at 483-568). Wedgewood LP then began its (second) cross-examination of Ms. Foust. (Tr. at 568-593);

(f) December 11, 2007 – Wedgewood LP called Mr. Oakes, the engineer who drafted the plans attached to the Application for the Zoning Certificate for the proposed Wal-Mart. (Tr. at 604-629). Liberty

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[2] On October 9, 2007, this Board convened. Because one of the Board members was unable to participate in the hearing on October 9, 2007, the Appellant decided not to continue with the hearing on that day, with an incomplete Board, and requested a continuance. This Board approved the request, without objection.

Township then cross- examined Mr. Oakes. (Tr. at 629-653). Upon the conclusion of the Oakes testimony, Wedgewood LP continued with its cross-examination of Ms. Foust. (Tr. at 654-674). After redirect and re-cross examinations of Ms. Foust (Tr. at 674-706), Wedgewood LP rested its case-in-chief;

(g) April 29, 2008[3] – Liberty Township called John Werner as its second witness. Mr. Werner was one of the Liberty Township Trustees, in 1991, who voted to approve the WCC rezoning. (Tr. at 729-831);

(h) May 6, 2008 – Wedgewood LP began its cross-examination of Mr. Werner. (Tr. at 841-954);

(i) June 10, 2008 – Wedgewood LP continued its cross-examination of Mr. Werner. (Tr. at 962-979). After redirect and re-cross examinations of Mr. Werner (Tr. at 979-996), Liberty Township called John McCarrier, another one of the Liberty Township Trustees in 1991. (Tr. at 996-1006). Wedgewood LP cross-examined Mr.

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[3] On January 29, 2008. the Board convened for the purposes of holding additional public hearings. By the agreement of all parties, the Board continued the January 29, 2008 hearing until April. As explained to the Board, on or around January 29, 2008, Liberty Township located audiotapes that may have contained recordings of the 1991 public hearings when the WCC proposal was approved. Both parties expressed a preference for review of those audiotapes before continuing with the Remanded Public Hearings.

McCarrier. (Tr. at 1006-1038). Liberty Township then called Dr. Robert Cape, the third Liberty Township Trustee in 1991. (Tr. at 1038-1063). Wedgewood LP then began its cross-examination of Dr. Cape. (Tr. at 1063-1089);

(j) June 24, 2008 – Wedgewood LP continued its cross-examination of Dr. Cape. (Tr. at 1097-1133). Liberty Township then called Keith Myers, its last witness. (Tr. at 1133-1139). Mr. Myers, with Myers Schmalenberger, was Wedgewood LP's land planner in 1991, and drafted the WCC Development Plan. Wedgewood LP cross-examined Mr. Myers. (Tr. at 1140-1150). Liberty Township rested its case-in-chief. (Tr. at 1152.); and

(k) July 22, 2008 – Counsel for Wedgewood LP and Liberty Township presented closing arguments, and thereafter the Board began its deliberations.

26. During the Remanded Public Hearings, the Board admitted additional documents into evidence.[4]

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[4] This appeal is from the Zoning Inspector's September 30, 2004 Decision (the "Decision"). With respect to the revised drawings, and with respect to the Applicant's purported withdrawal of the "Murphy Oil" part of the interrelated but severable applications for zoning certificates, these documents were filed with the Zoning Department simultaneously with the filing of the appeal of the Decision, on October 20, 2004. This was after the Zoning Inspector's September 30 Decision was issued. This Board finds that those documents were not and cannot be considered as, part of the record "upon which the action appealed from was taken."

During the Remanded Public Hearings, the Board attempted to examine and refer to each exhibit as it was presented.

27. The Board finds that during the course of the Remanded Public Hearings, Wal-Mart abandoned the plans for a Wal-Mart SuperCenter in the WCC (Tr. at 722-729), and is no longer in contract with Wedgewood LP. Throughout the more than three years during which this matter has been pending before this Board, it has never been disputed that this Application is for the construction of a Wal-Mart SuperCenter Store.

FINDINGS AS TO THE WEDGEWOOD COMMERCE CENTER DEVELOPMENT PLAN

28. On a date prior to June of 1991, Wedgewood Limited Partnership I, Realty Co., BIK Realty, and Clarence Tuller filed an Application for amendment of the zoning Map, seeking a rezoning from FR-1 to Planned Commercial for 315.12 acres, the Wedgewood

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Additionally, the Board finds that the Appellant's contention that language in the last paragraph of Section 28.04 of the Resolution permits this Board to consider modifications of an application filed after a decision is made is not persuasive. Such an interpretation would permit an applicant to avoid the important review and assessment of an application for a compliance certificate performed by the Zoning Department, and is not consistent with the standards and requirements for an appeal as established by Section 519.15 of the Ohio Revised Code, or Section 28.05 of the Resolution. Accordingly, these Findings of Fact and Conclusions of Law are based upon the application as it existed on the date of the Zoning Inspector's Decision, September 30, 2004, and not on the basis of any documents which the Zoning Inspector neither saw, nor had the opportunity to review, nor had an opportunity to comment upon.

Commerce Center development. (*See* October 2, 1991 meeting minutes, Department Ex. 12, at 000001).[5]

29. One of the original applicants for the Wedgewood Commerce Center development, Wedgewood Limited Partnership I, is the Appellant which is pursuing this appeal.

30. Charles Ruma was present at the October 2, 1991 meeting. (*See* October 2, 1991 meeting minutes, Department Ex. 12, at 000001).

31. Charles Ruma is the individual who signed the Applications on behalf of Wedgewood Limited Partnership I and who signed the appeal on behalf of Wedgewood Limited Partnership I.

32. Both the Delaware County Regional Planning Commission and the Liberty Township Zoning Commission recommended denial of the 1991 Wedgewood Commerce Center development plan, as originally drawn. (*See* October 2, 1991 meeting minutes, Department Ex. 12. at 000001). Both bodies reflected concerns with, among other things, the total amount of commercial square footage projected in the development.

33. The Liberty Township Trustees eventually approved the Wedgewood Commerce Center development plan on November 18, 1991 (*See* Nov. 18, 1991 meeting minutes, Department Ex. 12, at 000007).

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[5] Department Ex. 16 is substantially the same as components of Department Ex. 12, as well as several WW Exhibits.

34. Prior to the Trustees' approval of the Wedgewood Commerce Center development, the original applicants negotiated with the Trustees, and the parties agreed to many compromises. (*See* Oct. 2, Oct. 21, Nov. 11, and Nov. 18 meeting minutes, Department Ex.12, at 000001-000007).

35. The Wedgewood Commerce Center development was originally submitted as a twenty-year plan, with four five-year phases. (*See* October 2, 1991 meeting minutes. Department Ex. 12, at 000001).

36. At the October 2, 1991 public hearing, the Trustees did not vote on the Wedgewood Commerce Center rezoning. Rather, the applicants requested that the application be tabled so that "issues brought before this board could be negotiated." (*See* October 2, 1991 meeting minutes, Department Ex. 12, at 000002).

37. The Trustees' concerns regarding the Wedgewood Commerce Center development included the following: "the time length of the development: that the development's density was too high and not in accordance with comprehensive plan; and that the biggest concern [was] commercial." (*See* October, 2, 1991 meeting minutes, Department Ex. 12, at 000001-000002).

NOVEMBER 11, 1991 PUBLIC HEARING

38. At the November 11, 1991 public hearing, the Wedgewood Commerce Center's applicants acknowledged their agreement with the following: (1) "architectural review committee to be established pursuant to the development plan"; (2) project to be phased in four phases of five years each; (3) "provide

pedestrian pathways between and within subareas, as appropriate"; and (4) to limit density to "one million square feet of office (-200,000); one half million square feet of retail (-33,000); and 750 units on 179.9 acres of residential (-40 units)." (*See* November 11, 1991 meeting minutes, Department Ex. 12, at 000003-000005).

NOVEMBER 15, 1991 AMENDMENTS TO DEVELOPMENT STANDARDS

39. Department Ex. 11 is a document entitled "Wedgewood Commerce Center Amendment to Development Standards" included in the records of Liberty Township as a part of the approved development plan For the Wedgewood Commerce Center development. At page 4 of that document, under the heading "Subarea Development Criteria — Criteria Generally," the Applicant made the agreement that, "Gross square footage of commercial construction shall not exceed Five Hundred Thousand (500,000) square feet." This particular development limit, applicable to the entire Wedgewood Commerce Center development, is further made evident in the Addendum "A" that is a part of the development plan of record in the Township (Department Ex. 9, page 000053). The fact that these documents were made a part of the development plan is made clear by the references to them contained in the minutes of the proceedings before the Trustees (Department Ex. 12).

NOVEMBER 18, 1991 PUBLIC MEETING

40. At the November 18, 1991 public hearing, the applicants presented concessions made on November 14, including that "Sawmill Parkway would be

developed in Two Phases; Phase I from County Line north to Roadway B and would happen in the first five years, and Phase II from Roadway B to Powell Road. Mr. Ruma stated he is waiting to hear from Big Bear on the finalization of Phase II, which should take five years or less." (*See* November 18, 1991 meeting minutes, Department Ex. 12, at 000008).

41. Further, the Applicant acknowledged that the "500,000 square feet of commercial development would be split into *Two Phases*, parallel to the construction of the [Sawmill Parkway] road; first 280,000 sq. ft. to be constructed in the South end of the development in the First Phase." (*See* November 18, 1991 meeting minutes, Department Ex. 12. at 000008).

42. The pending Application for Zoning Certificates is for property within Subarea 3, in the South end of the development, which was to be developed in the first five-year phase.

43. The Wedgewood Commerce Center Applicant summarized the density of the development as "195 acres of residential is 3.99 units per acre, [which] is 780 units. 500,000 sq. ft. of commercial at 9,000 sq. ft. per acre is 45 acres of commercial." (*See* November 18, 1991 meeting minutes, Department Ex. 12, at 000008).

44. Prior to the Trustees' November 18, 1991 vote, the Applicant agreed to include all the agreed-upon concessions reflected in Addendum "A" "into a document for the Township records." (*See* November 18, 1991 meeting minutes, Department Ex. 12, at 000008).

45. Holly Foust testified that the key documents upon which she relied to reach her conclusion that a 500,000 sq. ft. limit on commercial development existed were the November 18, 1991 minutes, the Addendum "A" to the Development Plan, and the November 15 amendments to the Development Plan. (Foust Tr. at 487-488).

FINDINGS WITH REGARD TO FEDERAL COURT DECISION

46. During the multiple sessions of deliberations, the United States District Court of Ohio, Eastern Division, Case No. C2-04-1069 (the "Federal Case") issued an Opinion and Order on cross-motions for summary judgment.

47. The Board of Zoning Appeals is not a party to the Federal Case. Parties Defendant in the Federal Case appear from the face of the Decision in the Federal Case to be Holly C. Foust, Robert E. Cape, Peggy Guzzo, Curt Sybert, the Township of Liberty, Delaware County, Ohio, and the Board of Trustees of Liberty Township, Delaware County, Ohio.

48. In the Decision in the Federal Case, the Honorable Judge Marbley found, among other things:

(a) Plaintiff (i.e., Wedgewood Limited Partnership I) "asserts that it had no involvement or input in Liberty Township's approval of these zoning changes." (Opinion at p. 4).

(b) Addressing the 500,000 square-foot floating cap first, "the Court has two possible

interpretations of the PUD Plan: (1) the 500,000 square foot limitation discussed in the November 15 amendments and Addendum A was meant to work in conjunction with the individual allowances for commercial development in subareas 3, 8 and 9 (which coincidentally happened to total approximately 500,000 square feet); or (2) the discussion of 500,000 square feet in the PUD Plan is solely a summation of the allowable commercial development in the thee subareas approved for commercial use. . . ." (Opinion at p. 15).

(c) ". . . the Zoning Inspector denied Plaintiff's permit applications because Plaintiff failed to comply with a number of elements of the Liberty Township Zoning Resolution beyond the floating cap, and the record does *not* suggest that the denial was unwarranted. . . ." (Opinion at p. 21).

(d) The Court **GRANTS** Plaintiffs request to enjoin the enforcement of the January 19 Instructions. In particular, it is ordered that Liberty Township may not impose a 500,000 square foot 'floating cap' over the WCC PLD Plan . . . ." (Opinion at p. 22).

49. It is not clear from the Opinion and Order what evidence the Court had before it when ruling on the summary judgment motions before it; equally unclear is why the Liberty Township Board of Zoning Appeals was not made a party to the proceedings so as to be clearly bound by any decision rendered. The parties have not provided this Board with any legal authority

which stands for the proposition that this Board, as a non-party to the action, is bound in all respects by the factual determinations made by the Federal Court.

FINDINGS WITH REGARD TO HEARINGS UPON REMAND

50. With regard to Reason No. 1 set forth in the Decision of the Zoning Inspector dated September 30, 2004, we find that while the entire development plan may not have been available or located on November 18, 1991, it was located thereafter and was discussed in evidence in the proceedings before this Board. (*See* Foust Tr. at 484-496, 547, 670; WW Ex. 9; and Department Ex. 11).

51. With regard to Reason No. 2 of the Decision, we find that the proposed development would have exceeded maximum allowable levels of square footage of commercial development. Upon rehearing, there was no evidence presented on acreage limitations and no argument made; therefore, we find the proposed development would not have exceeded any applicable acreage limitations. We further find the January 19 Instructions are not pertinent to this application, and there was no legally enforceable requirement for this Applicant to follow a major modification procedure to the approved zoning plan.

52. With regard to Reason No. 3, we find that the application did not include the approval of any properly constituted Wedgewood Commerce Center Architectural Review Committee. Each application for zoning permit approved in the Wedgewood Commerce Center following 1991 until this Application did include the approval of Rosalind Childers (or another

associate of Charles Ruma, the principal member of Wedgewood Limited Partnership I, the Applicant) (e.g., Department Ex. 31, Foust Tr. at 516-519, Foust Tr. at 170).

53. With regard to Reason No. 4.a – 4.i set forth in the Decision we find that the problems noted in 4.a through 4.i were all supported by evidence.

54. With regard to Reason No. 4.a – 4.i., we find that, under normal circumstances, many, if not all, of these problems would have been corrected to the satisfaction of the Zoning Inspector prior to the issuance of her decision; however, in this case, the Applicant/Appellant's counsel pressed the Zoning Inspector for a decision on the application as originally submitted. (Foust Tr. at 190, 541-542).

55. With regard to 4.a – 4.i, these items such as lighting fixtures and details, fencing details, building materials, and dimensions, locations of easements and setbacks, and driveway details are items that this Board of Zoning Appeals is commonly called upon to assess, evaluate, and review.

56. With regard to 4.a – 4.i, many of these items could have been resolved through additional calculations or effort undertaken by the Zoning Inspector; we find those calculations, scalings, or extrapolations are not the responsibility of the Zoning Inspector. They are instead the Applicant's responsibility to show these items are clearly reflected on the correct portion, page, or location of a plan sheet.

57. With regard to the conclusion of the Federal Case that two interpretations of the 500,000 square

feet of commercial space are available [Finding of Fact 48(b)], we find with all due respect that the evidence before this Board leads us to conclude by a preponderance of the evidence that a third interpretation exists. We find that the 500,000 square foot limitation was specifically bargained-for and pertains to the entire Wedgewood Commerce Center territory.

58. With regard to the 500,000 square feet maximum commercial development, the BZA finds, in the absence of a bar imposed by the Federal Court, as follows:

(a) The record is replete with references to and there can be no doubt that a 500,000 square foot maximum for commercial development within the 345 acres of Wedgewood Commerce Center was agreed to by the Applicant and the Trustees, and was incorporated into the development plan for Wedgewood Commerce Center in 1991-1992; there similarly is no doubt that at the time the original plan was submitted in 1992, the only areas designated for commercial development were Subareas 3, 8, and 9;

(b) Charles Ruma and/or associations he controlled, Davidson-Phillips, Wedgewood LP I, have at all pertinent times been owners and interested parties in substantially all of the parcels of land contained within Wedgewood Commerce Center (Department Ex. 38) (Deeds, Department Ex. 31, Architectural Approvals) (*See*, *also*, Ruma Tr. at 291-292);

(c) Following the submittal of the development plan, Charles Ruma did intervene and object to a Speedway Gas Station, a commercial retail establishment, in an area designated suburban office, in 2004. (Foust Tr. at 120-1 24);

(d) Following the submittal of the development plan, Wedgewood Limited Partnership I or its principal, Charles Ruma became aware of, or sought permits for, applications for commercial development within Wedgewood Commerce Center in subareas outside of Subareas 3, 8, and 9. Specifically, Charles Ruma and/or his employees or agents were aware of commercial developments in Subareas 6 and 10 as evidenced by the endorsement/execution of those plans by Rosalind Childers in lieu of the Architectural Review Committee. (*See*, e.g., Architectural Review Committee approval May 17, 2001);

(e) Despite his knowledge of commercial development outside of Subareas 3, 8, and 9, Charles Ruma and associations he controlled, including Wedgewood LP 1, failed to take action to halt commercial development in Subareas 4, 5, 6 and 10;

(f) Charles Ruma and associations he controlled, including Wedgewood LP 1, were aware of, benefitted from, or acquiesced in commercial development in Subareas 4, 5, 6 and 10 between February 1992 and the submittal of the Application herein in 2004 (Department Ex. 31);

(g) Following approval of the development plan in 1991, substantial "leaching" of commercial uses into Subareas 6 and 10 occurred; these commercial uses were known to, approved by, or acquiesced to by Wedgewood Limited Partnership I or its principals;

(h) No running tally of the cumulative square footage of commercial development approved for Wedgewood Commerce Center was maintained by Liberty Township between 1992 and 2004; and

(i) The chart prepared by Ms. Foust of commercial development in Wedgewood Commerce Center was created on or about the time period December 2003, before the Application for Wedgewood Limited Partnership I was submitted.

59. The tape recording of Charles Ruma from 1991 public hearings (Exs. 46, 47) and the testimony of Keith Myers (Tr. at 1138-1139) support the finding that the 500,000 square feet maximum applied to the entire Wedgewood Commerce Center development, not simply Subareas 3, 8, and 9. The BZA finds Mr. Ruma's testimony from the evidentiary hearings (i.e., specifically that there "never" was a maximum square footage limitation which pertained to the entire Wedgewood Commerce Center) not credible in light of overwhelming evidence to the contrary. (*See*, e.g., Ruma Tr. at 466-473).

60. Addendum "A" to the Wedgewood Commerce Center Development Plan Ex. 9, p. 00053) supports the finding that there was a maximum limitation of

commercial development established for the entire Wedgewood Commerce Center development at 500,000 square feet.

61. The BZA finds the terms "commercial," "office," and "retail" were not specifically detailed in the Zoning Code, or in any version of the Wedgewood Commerce Center proposal, either at the time the development plan was approved or at the time of the Application for the Wal-Mart Store (Foust Tr. at 116); therefore, a common usage definition should apply. This Board finds Ms. Foust's application of those terms reasonable under the circumstances in which the terms are not defined.

62. At the time of the Application for the Wal-Mart SuperCenter there had been 390,611 square footage of commercial use approved for Wedgewood Commerce Center, leaving 109,399 permissible square feet of commercial development available.

63. This Board finds that all the development uses proposed for Wedgewood Commerce Center have commercial aspects to them and the Board will defer to and adopt the approach of the Zoning Inspector; any classification of uses as "office" on the one hand instead of as "retail" or "commercial" on the other hand by the Zoning Inspector worked to the benefit of the Applicant for purposes of the maximum allowable square footage for the planned unit development.

64. With respect to the Murphy Oil USA, Inc. application, no evidence or argument was presented at the rehearings.

CONCLUSIONS OF LAW

(A) As dictated by Ohio Rev. Code Section 5 19.021, the applicable portion of Liberty Township Zoning Code pertaining to planned unit developments, Section 14.08(J), mandates that development plans substantially comply with the approved development plan for planned unit development, notwithstanding the full compliance or complete conformity standard that is found in Ohio Revised Code § 519.17 and Zoning Code § 25.03, respectively, for zoning applications pertaining to all other zoning classifications.

(B) If this Board determines there is not substantial compliance of the Application (including plans submitted) with the development plan, this Board of Zoning Appeals must affirm the Zoning Inspector's determination.

(C) It is the obligation of the Applicant to demonstrate the Application substantially complied with the approved development plan in the face of the rejection of the plan by the Zoning Inspector.

(D) This Board finds that Reason No. 1 of Ms. Foust's Decision is insufficient to demonstrate lack of substantial compliance with the development plan.

(E) As set forth in Reason No. 2 of Ms. Foust's Decision, the plan submitted by Wedgewood

Limited Partnership I for construction of a Wal-Mart SuperCenter consisting of 220,598 square feet of commercial space would exceed the square footage limitation agreed upon for commercial uses in Wedgewood Commerce Center. This factor alone justifies the conclusion that the Application does not substantially comply with the approved development plan.

(F) There is no requirement imposed under the development plan or Zoning Code for Liberty Township to maintain a "running tally" of commercial uses approved for any particular planned unit development. The Application for the 220,598 square foot Wal-Mart SuperCenter was the first application which necessitated the application of the 500,000 maximum square feet of commercial space permitted for Wedgewood Commerce Center.

(G) The minutes of the Trustees' meetings from October 2, October 21, November 11, and November 18, 1991 are the best evidence of the discussions which took place at those meetings. Those documents were reviewed by Ms. Foust during the time leading up to the creation of the chart identified as part of Department Ex. 15.

(H) Ms. Foust did not "make up" the square footage limitation as argued by counsel for Appellant/Applicant; rather Ms. Foust "looked up" the records at the urging of Trustees and interested citizens, consistent with how a conscientious zoning

administrator should act with a development plan that dates back to 1991-1992.

(I) The taped records of meetings discovered during the pendency of these proceedings support the existence of an overall cap of 500,000 square feet of commercial development throughout Wedgewood Commerce Center was negotiated and incorporated into the development plan.

(J) The Board concludes from the Federal Court decision that the January 19 Instructions and requirement to follow a major modification procedure cannot be imposed upon this or all subsequent applications for commercial uses in Wedgewood Commerce Center.

(K) Upon the evidence presented to it, this Board respectfully rejects the argument that the much discussed and bargained for 500,000 commercial square-foot limitation was restricted only to Subareas 3, 8, and 9; the logical extension of that proposition would allow unlimited commercial development in Subareas 1, 2, 4, 5, 6, 7, and 10-17. Such a result would render the much discussed and extensively negotiated 500,000 square-foot limitation for commercial development within Wedgewood Commerce Center a nullity.

(L) The Board finds that Applicant has demonstrated Reason No. 3 in the Zoning Inspector's decision is insufficient under the

facts to demonstrate the Application does not substantially comply with the development plan. None of the post-1991 development in Wedgewood Commerce Center has received the approval of a properly conducted Architectural Review Committee.

(M) This Board finds there is evidence to support Reasons 4.a - 4.i of the Zoning Inspector's Decision. Those factors taken together justify a finding that the plan, in its entirety, does not substantially comply with the approved development plan. Applicant has failed to demonstrate the reasons were not supported and has failed to demonstrate the cumulative effect of noncompliance would not justify denial of the Application.

(N) With regard to the Murphy Oil USA, Inc., there has been no evidence presented to suggest that the Application substantially complied with the development plan.

Upon all of these findings, and for all the reasons set forth above, upon the record and the evidence presented to this Board of Zoning Appeals, we adopt these Findings and Conclusions and affirm the September 30, 2004 Decision of the Liberty Township Zoning Inspector to deny the Application for Murphy Oil Gas Station.

Motion by _____ Second by _____

Roll Call Vote:	**Nays**	**Yeas**
_____ Sherry Blackston	☐	☐
_____ Philip Fry	☐	☐
_____ Bonnie Goodson	☐	☐
_____ Rick Reeder	☐	☐
_____ Suzanne Vais	☐	☐

Dated _____

Upon all of these findings, and for all the reasons set forth above, upon the record and the evidence presented to this Board of Zoning Appeals, we adopt these Findings and Conclusions and affirm the September 30, 2001 Decision of the Liberty Township Zoning Inspector to deny the Application submitted by Wedgewood Limited Partnership for the Wal-Mart SuperCenter Store.

Motion by _____ Second by _____

Roll Call Vote:	**Nays**	**Yeas**
_____ Sherry Blackston	☐	☐
_____ Philip Fry	☐	☐
_____ Bonnie Goodson	☐	☐
_____ Rick Reeder	☐	☐
_____ Suzanne Vais	☐	☐

Dated _____

ND: 4847-7300-1218, v. 4

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Case No. C2 04 1069

District Judge Marbley
Magistrate Judge King

WEDGEWOOD LIMITED PARTNERSHIP I,	)
Plaintiff,	)
v.	)
TOWNSHIP OF LIBERTY, OHIO, et al.,	)
Defendants.	)

NOTICE OF THE LIBERTY TOWNSHIP DEFENDANTS OF THE ISSUANCE OF FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE LIBERTY TOWNSHIP BOARD OF ZONING APPEALS ON OCTOBER 21, 2008

The Liberty Township Defendants hereby give notice to this Court that on October 21, 2008, the Liberty Township Board of Zoning Appeals issued its Findings of Fact and Conclusions of Law in *Wedgewood Limited Partnership I v. Holly C. Foust, et al.*, Liberty Township Board of Zoning Appeals Case No. BZA04-28. A copy of the Liberty Township Board of Zoning Findings of Fact and Conclusions of Law is attached.

Respectfully submitted,

/s/ Scott A. Campbell
Michael W. Currie (0013100)
O. Judson Scheaf, III (0040285)
Scott A. Campbell (0064974)
Michele L. Noble (0072756)
Thompson Hine LLP
10 West Broad Street, Suite 700
Columbus, Ohio 43215
(614) 469-3200 (614) 469-3361 (fax)
Mike.Currie@ThompsonHine.com
Jud.Scheaf@ThompsonHine.com
Scott.Campbell@ThompsonHine.com
Michele.Noble@ThompsonHine.com

/s/ William L. Loveland
William L. Loveland (0007649)
Loveland & Brosius, LLC
50 W. Broad St., Suite 3300
Columbus, Ohio 43215
(614) 464-3563
(614) 224-6221 (fax)
wloveland@lblaw.net

Attorneys for The Liberty Township Defendants

* * *

[*Certificate of Service Omitted in Printing of this Appendix*]

APPENDIX K

**IN THE COURT OF COMMON PLEAS
OF DELAWARE COUNTY, OHIO**

Case No. 08 CV F 11 1532

[Filed June 11, 2009]

WEDGEWOOD LIMITED PARTNERSHIP I,	)
Appellant,	)
-vs-	)
LIBERTY TOWNSHIP BOARD OF ZONING APPEALS,	)
Appellee.	)

JUDGMENT ENTRY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On June 29, 2004 Charles Ruma on behalf of Wedgewood Limited Partnership, filed two applications for zoning permits regarding Lot 2069 in Wedgewood Commerce Center, Section 1 Subdivision (Hereafter "Applicant").

2. The Applicant sought Certificates of Zoning compliance for two proposed areas for this single parcel.

3. One application was for a Wal-Mart SuperCenter containing 220,595 square feet of building area.

4. The other application sought approval of a 243 square foot building for a Murphy Oil Gas Station.

5. On September 30, 2004, the Liberty Township Zoning Inspector denied these Applications. The Zoning Inspectors decision listed the following reasons for denying the application:

   a. "The Development Plan for Wedgewood Commerce Center remains incomplete, because at no time has this office received a revised Development Plan and Plat which in all respects conforms to the representations and commitments made at the meeting of the Liberty Township board of Trustees which occurred on November 18, 1991, and at the hearings which preceded that final hearing. The applicant, Wedgewood Limited Partnership, for the current zoning application, is an entity that is closely related to the entity Wedgewood Limited Partnership I which sought and obtained the rezoning of the land which is now the Wedgewood Commerce Center, and is also the Appellant, and the principals of these entities are directly responsible for the lack of performance in producing and filing a

revised Development Plan which was promised;"

b. "The request for approval does not meet either the documented or the promised and agreed upon requirements of the currently effective Development Plan applicable to the Wedgewood Commerce Center Planned Commercial Zoning District. In the context of the amount of commercial development already constructed and allowed in the Wedgewood Commerce Center, the proposed construction would exceed the maximum allowable commercial acreage and square footage limitations that were expressly made a part of the development plan;

c. The application is incomplete because it does not include the required approval of the Wedgewood Commerce Center Architectural Review Committee;" and

d. "The application is incomplete, internally inconsistent, and at variance with the requirements of the Liberty Township Resolution and the standards established and applicable under the Wedgewood Commerce Development Plan in 9 detailed respects with regard to the retail building component of the Applications and in 16 ways with respect to the Murphy Oil USA component of the Applications."

6. On October 20, 2004, Appellant, Wedgewood Limited Partnership filed an appeal from the zoning inspector's denial of the applications.

7. On the same day, the Appellant, Wedgewood, tendered a letter withdrawing the application of Murphy Oil and submitted a revised plan which was intended to address the issues raised by the zoning inspector.

8. On November 5, 2004, Wedgewood filed a Federal lawsuit against the Township of Liberty, Board of Township Trustees and Holly C. Foust, zoning inspector seeking a declaratory judgment and injunction enjoining the Township offices from enforcing the alleged 500,000 square foot floating cap on the commercial development.

9. On November 16, 2004, the Board of Zoning Appeals (BZA) held a hearing on the Appellant, Wedgewood's appeal.

10. After considering the evidence and its perception of the law, the BZA affirmed the zoning inspector's denial of the application and issued Findings of Fact and Conclusions of Law on January 11, 2005.

11. Wedgewood Partnership filed a R.C. Section 2506 appeal and on September 22, 2005, this Court in Case Number 05 CV F-02-11, remanded the case to the Liberty BZA for that Board to answer the following:

    a. Determine the basis of the Zoning Inspector's decision;

    b. Provide documentation of the legal basis for the 500,000 square feet commercial limit on

the Wedgewood Commerce Center Plan Development and;

c. Provide documentation of the effect of the original Planned Unit Development Plan. (The original Development Plan zoned the area commercial and there was no mention of square footage.)

12. Wedgewood Limited Partnership, appealed to the 5th District Court of Appeals this Court's decision and remand.

13. On January 8, 2007, the Court of Appeals, Delaware County, Ohio, Fifth Appellate District ruled the Trial Court's September 22, 2005 Decision and Entry was not a final appealable order and dismissed the appeal.

14. On June 12, 2007, the Trial Court held a Status Conference to set a hearing date before the Liberty Township Board of Zoning Appeals.

15. The BZA held 10 evidentiary hearings on the remand, starting September 11, 2007 through June 24, 2008.

16. **Charles Ruma, one of the principles in Wedgewood Limited Partnership stated under oath during his deposition dated June 25, 2008 (at page 259) which was taken in conjunction with the Federal Case, that as of March, 2008, Wal-Mart had terminated its agreement to purchase and build on the real property in question.** See also BZA hearing transcript at page 724.

17. On September 26, 2008, Algenon L. Marbley, United States District Judge for the Southern District of Ohio ruled that the alleged "500,000 floating cap" on commercial square footage does not exist and enjoined the Township from asserting said restriction. Wedgewood Limited Partnership I v. Township of Liberty, Ohio, et al., Case No. C2-04-1069.

18. On October 21, 2008, the BZA issued Findings of Fact and Conclusions of Law which affirmed the zoning inspectors denial of the zoning certificate. The BZA further specifically stated:

> "The Board finds that during the course of the Remanded Public Hearings, Wal-Mart abandoned the plans for a Wal-Mart SuperCenter in the WCC (Tr. At 722-729), and is no longer in contract with Wedgewood LP. Throughout the more than three years during which this matter has been pending before this Board, it has never been disputed that this Application is for the construction of a Wal-Mart SuperCenter Store".

19. On November 19, 2008, Wedgewood Limited Partnership filed a Section 2506 appeal of the October 21,2008 BZA decision.

> **(Appeal was filed under a new Case Number 08 CVF-11-1532 when it should have been filed as supplemental filings in the original Case Number 05- CV F-02-101. This Court therefore**

consolidated the two cases under Case Number 05 CV F- 02-101.)

20. On March 17, 2009, Appellee Liberty Township, the Liberty Township Trustees and the Liberty Township Zoning Inspector moved to dismiss this appeal for lack of subject matter jurisdiction based upon the fact that the issues presented in the Section 2506 Appeal were moot because Wal-Mart no longer wished to use the real property for a Wal-Mart and Wal-Mart has no existing interest in the real estate for which the zoning certificate had been sought.

The first issue which the Court must address is the Motion to Dismiss this Appeal filed by the Township for want of subject matter jurisdiction, because the issues are moot.

This Court may only issue decisions which are necessary to resolve a valid justifiable dispute. As both parties have stated, "appeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant." City of Willoughby Hills vs. C.C. Bar's Sahara Inc. (1992) 64 Ohio St. 3d 24.

The purpose of a zoning certificate is to memorialize that all necessary zoning requirements have been met and construction can begin. Zoning certificates are evidence that the applicant has complied with each of the required zoning conditions to build a specific building, including but not limited to the following:

1. Building Square feet and height.
2. Building foot print on property.
3. Set-backs and side yards.
4. Parking and access.
5. Architect's design.

Each of the above requirements relate to the specific piece of real estate and the specific building planned to be built. They are not "generic". The certificate is specific to the land use and building improvements proposed.

This Court, based on the record concurs with the Federal Court's ruling that the 500,000 square foot "floating cap" does not exist nor can it be enforced. The remaining technical requirements which the zoning inspector used for her rationale in denying the application are particular to this application and land use, i.e .a Wal-Mart store. Wal-Mart is no longer involved. Therefore, the specific requirements of the zoning certificate are no longer relevant.

To illustrate this point on the facts of this case, one need only look at the remaining four technical deficiencies found by the Zoning Inspector.

a. "The Wedgewood Commerce Center Development plan requires the rear setback for this subarea (Subarea 3) to be the 100" wide power easement. This easement is not identified on the site plan (pg. 3 of 11), so it is not possible to determine compliance with this requirement."

b. "Section 25.03 of the Zoning Resolution requires that the site plan show structural dimensions at the ground. No structural dimensions are provided on the site plan which has been submitted (page 3 of 11)."

c. "Section 21.17 of the Zoning Resolution regulates fences. There is an 8' high screen wall shown on the plans, 55 feet from the west property line (on page 3 of 11). This does not comply with section 21.17 of the Resolution, but does meet the requirements of 14.07 A (requires that all uses with this zoning district be enclosed within a structure or screened from view by fences and/or landscaping.)"

d. "The southeast area of the site plan (page 3 of 11) is blank. The development plan requires that all yards be landscaped. In order to be complete, the site plan needs to show the proposed use and improvements in this area."

Since Wal-Mart is not going to buy, lease or build on the parcel in question and the appellant has not disputed this position, the Court finds that this appeal is moot.

The Fifth District Court of Appeals ruled on this question in the affirmative. Springtime Co. v. Union Tp. Bd. of Zoning Appeals, 1996 WL 363812, 1996 Ohio App Lexis 2934. There, the Court held that a developers' administrative appeal from a denial of a zoning permit was moot where the

application for a permit was for a building that the developer did not intend to build.

The Court of Appeals for Franklin County has similarly ruled when the use for which the permit sought had been abandoned and the owner had cancelled the contract and sold the real property to a third party, the matter became moot because there was no longer a real controversy between the parties. State ex rel. Senigh v. Schoenfeld (May 4, 1993) Franklin App. Nos 92 AP188, 92 AP-193; 1993 Ohio App. Lexis 2409.

For the above reasons, this Court finds the issues presented in this appeal to be moot and that this Court therefore lacks subject matter jurisdiction.

This appeal is Dismissed.

Dated: June 11, 2009.

/s/ W. Duncan Whitney
W. DUNCAN WHITNEY JUDGE

* * *

[*Certificate of Service Omitted in Printing of This Appendix*]

APPENDIX L

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

Case No. 09 CAH 07 0064

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

[Filed April 28, 2010]

WEDGEWOOD LIMITED PARTNERSHIP I	)
	)
Appellant/Cross-Appellee	)
	)
-vs-	)
	)
LIBERTY TOWNSHIP BOARD OF ZONING APPEALS, et al.	)
	)
Appellees/Cross-Appellants	)

OPINION

CHARACTER OF PROCEEDING:
Civil Appeal from the Court of Common Pleas, Case Nos. 05 CV F-02-101 and 08 CV F-11-1532

JUDGMENT:
Affirmed in part; Reversed in part

DATE OF JUDGMENT ENTRY:
April 28, 2010

APPEARANCES:

For Appellant/Cross-Appellee

BRUCE L. INGRAM
JOSEPH R. MILLER
52 East Gay Street, P. O. Box 1008
Columbus, Ohio 43216-1008

CRAIG B. PAYNTER
65 East State Street, Suite 1000
Columbus, Ohio 43215

For Appellees/Cross-Appellants

WILLIAM L. LOVELAND
50 West Broad Street
Suite 3300
Columbus, Ohio 43215-5917

MICHAEL W. CURRIE
41 South High Street, Suite 1700
Columbus, Ohio 43215-6101

Wise, J.

{¶1} Appellant/Cross-Appellee Wedgewood Limited Partnership I appeals the decision of the Court of Common Pleas, Delaware County, which dismissed an

administrative zoning appeal brought by appellant regarding a retail superstore project. The Appellees and Cross-Appellants herein are Liberty Township (Delaware County), the Liberty Township Board of Trustees, the Liberty Township Zoning Inspector, and the Liberty Township Board of Zoning Appeals ("BZA"). The relevant facts leading to this appeal are as follows.

{¶2} In November 1991, the Liberty Township Board of Trustees adopted a resolution approving the rezoning of 345 acres of land from farm residential to a "Planned Commercial District." At the same time, the trustees approved and adopted regulations applicable to the newly zoned Wedgewood Commerce Center. These regulations were filed in February 1992.

{¶3} The Wedgewood Commerce Center Development Standards divide the Planned Commercial District into 17 separate subareas within the Wedgewood Commerce Center, of which Subareas 3, 8, and 9 are designated for commercial use.

{¶4} The "Subarea Development Criteria" for subarea 3 provides that the gross building area for that subarea is 220,857 square feet. In turn, the Subarea Development Criteria for subarea 8 states that the gross building area for that subarea is 144,553 square feet, while the criteria for subarea 9 provides that the gross building area for that subarea is 134,520 square feet. Thus, the combined total gross commercial building area is 500,000 square feet. Following the adoption of the development plan for the Planned Commercial District, Liberty Township issued zoning certificates allowing commercial use in subareas that

were designated for "suburban office" use rather than for commercial use.

{¶5} Subarea 3 of the Wedgewood Commerce Center, which was platted in 1994 as lot 2069 and comprises approximately 34 acres, has been owned by appellant since 1991. In October 2003, appellant submitted an application for certain variances from the Liberty Township Zoning Resolution in order to construct a Wal-Mart Super Center on lot 2069, but later withdrew its application.

{¶6} On January 19, 2004, the Liberty Township Board of Trustees issued a "Public Statement and Instructions to Zoning Department Regarding Future Administration of Wedgewood Commerce Center Development Plan." In that document, the trustees interpreted the development plan as imposing a "floating" maximum of 500,000 square feet of commercial development in the Wedgewood Commerce Center.

{¶7} The trustees, in the aforementioned public statement, further concluded that "the negotiated plan required an architectural review (design review) board and process which, in our view, has not been considered or operated as contemplated."

{¶8} In June 2004, Charles Ruma, on behalf of appellant, filed two applications for zoning permits concerning Lot 2069 in the Wedgewood Commerce Center, Liberty Township. One application sought approval for a Wal-Mart superstore, approximately 220,000 square feet in size. The other application sought approval for a Murphy Oil gas station, including a 243 square feet building.

{¶9} On September 30, 2004, the Liberty Township Zoning Inspector denied both of Ruma's applications.

{¶10} On October 20, 2004, appellant filed a notice of appeal to the BZA from the zoning inspector's denial. Appellant therein alleged that the zoning inspector had acted improperly in determining that the development plan for Wedgewood Commerce Center was incomplete and in determining that the proposed construction would exceed the maximum square foot limitations. Appellant also alleged that the zoning inspector was incorrect in holding that a zoning certificate could not be issued because there was no approval by the architectural review board and in finding that the application was incomplete.

{¶11} A public hearing was held on November 16, 2004. On January 11, 2005, the Board of Zoning Appeals adopted a document titled "Findings of Fact and Conclusions of Law" that affirmed the decision of the zoning inspector.

{¶12} Subsequently, on February 8, 2005, appellant filed a notice of appeal from the BZA's decision with the Delaware County Court of Common Pleas, pursuant to R.C. 2506.01. The parties filed briefs in the trial court, and a hearing was held on July 18, 2005.

{¶13} Appellant filed an administrative appeal to the trial court under R.C. Section 2506. On September 22, 2005, the court remanded the case to the BZA for further review and findings.

{¶14} Appellant appealed to this Court from the September 22, 2005 decision. Upon review, we found

that said decision was not a final, appealable order. We thus dismissed appellant's appeal to this Court. See *Wedgewood Limited Partnership I v. Liberty Twp. Bd. of Zoning Appeals*, 169 Ohio App.3d 840, 2007-Ohio-62.

{¶15} The BZA thereupon conducted ten evidentiary hearings between September 11, 2007 and June 24, 2008.

{¶16} In the meantime, on September 25, 2008, in a related action in federal court, the United States District Court, Southern District of Ohio, issued a ruling that the 500,000 "floating cap" on commercial square footage referenced above would be enjoined from enforcement. See *Wedgewood Ltd. Partnership I v. Township of Liberty*, Ohio (S.D. Ohio 2008), 578 F.Supp.2d 941.

{¶17} The BZA, on October 21, 2008, issued a ruling with findings of fact and conclusions of law which affirmed the zoning inspector's denial of the zoning certificate. The BZA further specifically found that Wal-Mart had abandoned its plan to build the superstore and that Wal-Mart's contract with appellant had expired.

{¶18} On November 19, 2008, appellant again filed an appeal to the trial court under R.C. Section 2506.

{¶19} On June 11, 2009, the trial court found the issues in the administrative appeal to be moot and therefore dismissed said appeal. On July 9, 2009, appellant filed a notice of appeal to this Court. It herein raises the following sole Assignment of Error:

{¶20} "I. THE TRIAL COURT COMMITTED AN ERROR OF LAW WHEN IT CONCLUDED THAT THE CONTROVERSY BETWEEN WEDGEWOOD LIMITED PARTNERSHIP I AND THE LIBERTY TOWNSHIP BOARD OF ZONING APPEALS IS MOOT."

I.

{¶21} In its sole Assignment of Error, appellant contends the trial court erred in dismissing its Chapter 2506 administrative appeal on grounds of mootness. We disagree.

{¶22} As an appellate court, our standard of review to be applied in an R.C. 2506.04 appeal is somewhat limited in scope. See *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 12 OBR 26, 465 N.E.2d 848. "This statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on 'questions of law,' which does not include the same extensive power to weigh 'the preponderance of substantial, reliable and probative evidence,' as is granted to the common pleas court." *Id.* at f.n. 4. See, also, *Health Management, Inc. v. Union Twp. Bd. of Zoning Appeals* (1997), 118 Ohio App.3d 281, 285. Generally, the issue of mootness is a question of law; an appellate court therefore reviews a trial court's decision finding a matter moot under the de novo standard of review. *Harris v. Akron*, Summit App.No. 24499, 2009-Ohio-3865, ¶ 6 (additional citations omitted).

{¶23} We have frequently recognized that an appellate court is not required to render an advisory opinion on a moot question or abstract proposition.

See, e.g., *Moton v. Ford Motor Credit Co.* (Dec. 17, 2001), Richland App.No. 01CA4, 2001-Ohio-7041. Unless required to do so by statute or directive by a higher court, we find no reason this principle would not apply to a common pleas court hearing an administrative appeal. Indeed, in the case of *Springtime Co. v. Union Twp. Bd. of Zoning Appeals* (June 11, 1996), Licking App.No. 96-CA-31, 1996 WL 363812, a case which originated as a zoning dispute over a planned service station, we concluded: "It is apparent from the record that the appeal was moot at the time it was considered by the trial court. Appellant submitted an application for construction of a Go-Mart [Service Station]. However, *it is clear that Go-Mart had abandoned its plans to place a Go-Mart on appellant's property*, and appellant had no specific plans for the property." (Emphasis added). We thus held that the appeal was moot at the time it was considered by the trial court, and overruled all of the assigned errors without further analysis. Id.

{¶24} Appellant first contends that the denial of a zoning certificate does not necessarily kill the controversy between the property owner and the BZA simply because a third-party contract to buy the property has lapsed, particularly where the protracted dispute between the property owner and the township has allegedly "caused" the lapse. However, as aptly recognized by the Tenth District Court of Appeals, "'[a] moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, *** or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then-existing controversy.'" *Grove City v. Clark*, Franklin App.No. 01AP-1369, 2002-Ohio-4549, ¶ 11, quoting *Culver v. City of Warren* (1948), 84

Ohio App. 373, 393, 83 N.E.2d 82. In the case sub judice, the record reveals no written or oral agreement that Wal-Mart plans to revive the contract. In fact, Mr. Ruma has stated that he can merely assume that Wal-Mart is still interested in pursuing the project. See Ruma Deposition at 368-370. Under a different set of circumstances, we might look at the issue of the feasibility of alternative uses of a developed superstore building and site. However, Ruma's testimony reveals that all other developers who have expressed any interest in Lot 2069 do not intend to construct a building even remotely close to that in appellant's zoning petition. Id. at 257-286. It is thus highly unlikely that any court opinion now will have a "practical legal effect." *Clark*, supra.

{¶25} Appellant also urges that we address the merits of this appeal on the grounds that the issues before us are capable of repetition, yet evading review. See, e.g., *In re Suspension of Huffer from Circleville High School* (1989), 47 Ohio St.3d 12. However, this exception to the mootness doctrine requires a showing of "exceptional circumstances." See *State ex rel. Calvary v. Upper Arlington* (2000), 89 Ohio St.3d 229, 231. We note that in *Weinfield v. Welling* (April 9, 2001), Stark. App.No. 2000CA00252, this Court rejected an appellant's attempt to invoke the aforesaid exception, quoting as follows from the case of *Angerman v. State Medical Bd. of Ohio*, (Feb. 27, 1990), Franklin App. Nos. 89AP-896, 89AP-897: "As an intermediate appellate tribunal, it is a primary function of this court to locate, identify, and, if necessary, correct error committed at the trial court or administrative level. See Article IV, Section 3, Ohio Constitution. Unlike the Ohio Supreme Court, we are not a policy-making body and, therefore, while the

doctrine of mootness may be defeated at the Supreme Court level, we here are bound by it. 4 Ohio Jurisprudence 3d (1978) 268, Appellate Review, Section 119, and 4 Ohio Jurisprudence 3d (1978) 861, Appellate Review, Sections 478-479. * * *."

{¶26} Upon review, we find no reversible error in the trial court's dismissal of appellant's administrative appeal in this matter on grounds of mootness.

{¶27} Accordingly, appellant's sole Assignment of Error is overruled.

Cross-Appeal

{¶28} Appellees herein raise the following Assignments of Error on Cross-Appeal:

{¶29} "I. WHILE THE TRIAL COURT CORRECTLY RULED THAT WEDGEWOOD LIMITED PARTNERSHIP I'S ADMINISTRATIVE APPEAL WAS MOOT, BECAUSE WEDGEWOOD'S ADMINISTRATIVE APPEAL WAS MOOT, THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION TO DECIDE ANY OTHER ISSUES, AND THEREFORE ERRED WHEN IT WENT ON TO DECIDE MATTERS BEYOND THE MOOTNESS ISSUE.

{¶30} "II. IN THE EVENT THAT THIS COURT RULES WEDGEWOOD'S ADMINISTRATIVE APPEAL WAS NOT MOOT, OR THAT THE TRIAL COURT DID NOT ERR WHEN IT WENT ON TO DECIDE MATTERS BEYOND THE MOOTNESS ISSUE, THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER WHETHER THE RECORD

doctrine of mootness may be defeated at the Supreme Court level, we here are bound by it. 4 Ohio Jurisprudence 3d (1978) 268, Appellate Review, Section 119, and 4 Ohio Jurisprudence 3d (1978) 861, Appellate Review, Sections 478- 479. * * *."

{¶26} Upon review, we find no reversible error in the trial court's dismissal of appellant's administrative appeal in this matter on grounds of mootness.

{¶27} Accordingly, appellant's sole Assignment of Error is overruled.

Cross-Appeal

{¶28} Appellees herein raise the following Assignments of Error on Cross-Appeal:

{¶29} "I. WHILE THE TRIAL COURT CORRECTLY RULED THAT WEDGEWOOD LIMITED PARTNERSHIP I'S ADMINISTRATIVE APPEAL WAS MOOT, BECAUSE WEDGEWOOD'S ADMINISTRATIVE APPEAL WAS MOOT, THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION TO DECIDE ANY OTHER ISSUES, AND THEREFORE ERRED WHEN IT WENT ON TO DECIDE MATTERS BEYOND THE MOOTNESS ISSUE.

{¶30} "II. IN THE EVENT THAT THIS COURT RULES WEDGEWOOD'S ADMINISTRATIVE APPEAL WAS NOT MOOT, OR THAT THE TRIAL COURT DID NOT ERR WHEN IT WENT ON TO DECIDE MATTERS BEYOND THE MOOTNESS ISSUE, THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER WHETHER THE RECORD

CONTAINS SUBSTANTIAL AND PROBATIVE EVIDENCE TO SUPPORT THE LIBERTY TOWNSHIP BOARD OF ZONING APPEALS' OCTOBER 21, 2008 DECISION, AND GAVE NO DEFERENCE TO THE BZA'S FINDINGS OF FACT AND CONCLUSIONS OF LAW."

I.

{¶31} We agree with the proposition advanced by appellees/cross-appellants that the trial court's finding of mootness precluded further rulings as to the validity of the 500,000 square foot "floating cap" restriction. "If what was once a justiciable matter becomes moot, the courts of common pleas no longer have subject matter jurisdiction to hear the case." *Nemeth v. Nemeth*, Geauga App.No. 2008-G-2844, 2008-Ohio-4679, ¶6.

{¶32} Appellees' First Assignment of Error on Cross-Appeal is sustained.

II.

{¶33} We find it unnecessary to address appellees' Second Assignment of Error raised on cross-appeal, as the issue is moot based on our disposition of appellant's assigned error above. Cf., e.g., *Burkey v. Teledyne Farris* (June 30, 2000), Tuscarawas App. No. 1999AP030015,

{¶34} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Delaware County, Ohio, is affirmed in part and reversed in part.

By: Wise, J.

Gwin, P. J., and

Delaney, J., concur.

_____

_____

_____

JUDGES

JWW/d 04/01

IN THE COURT OF APPEALS
FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

Case No. 09 CAH 07 0064

[Filed April 28, 2010]

WEDGEWOOD LIMITED PARTNERSHIP I	)
	)
Appellant/Cross-Appellee	)
	)
-vs-	)
	)
LIBERTY TOWNSHIP BOARD OF ZONING APPEALS, et al.	)
	)
Appellees/Cross-Appellants	)

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed in part and reversed in part.

Costs to be split equally between the parties.

_____

_____

_____

JUDGES

APPENDIX M

THE SUPREME COURT OF OHIO

Case No. 2010-1034

[Filed September 29, 2010]

Wedgewood Limited Partnership I	)
	)
v.	)
	)
Liberty Township Board of Zoning Appeals et al.	)
	)

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

(Delaware County Court of Appeals; No. 09CAH070064)

/s/ Eric Brown
ERIC BROWN
Chief Justice

Supreme Court, U.S.
FILED
DEC 15 2010
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No. 10-635

In The
Supreme Court of the United States

TOWNSHIP OF LIBERTY, OHIO, et al.,

Petitioners,

v.

WEDGEWOOD LIMITED PARTNERSHIP I,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT E. TAIT (0020884)
Counsel of Record
BRUCE L. INGRAM
VORYS, SATER, SEYMOUR AND PEASE, LLP
52 East Gay Street
Columbus, Ohio 43215
Tel: (614) 464-6341
Fax (614) 719-4994
retait@vorys.com
Attorneys for Respondent

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COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE AND FACTS

Petitioners' Statement of the Case and Facts intertwines state and federal proceedings with detail that is not germane to this Court's consideration of the Petition. Despite this, their description of the case betrays their call for a writ of certiorari. Petitioners note that, if the restrictions they imposed on Respondent's land exceeded the existing zoning regulations, as the lower courts found, then "a due process analysis [is] necessary to determine whether Petitioners followed state procedural requirements for zoning amendments" and whether they violated due process protections. (Petition, at 5.) That is, Petitioners focus on a predicate factual question that formed part of the Sixth Circuit's resolution of whether Ohio law recognizes a property interest in the circumstances of this case.

This litigation arises from the public hysteria that ensued when Respondent planned to build a Wal-Mart store on land that it owned on the outer fringes of the Columbus, Ohio metropolitan area. The Sixth Circuit described the public uproar aptly, quoting a resident who asked whether the local politicians could "do anything about" the Wal-Mart store; the sentiment only "intensified" when Respondent submitted an application for a building permit. (Petition Appx., at 6a, 7a.) Petitioners have acknowledged their awareness of the "evident" and "significant public opposition to the proposed Wal-Mart." (Petition Appx., at 182a.) Indeed, opposition to the store was so spirited that local homeowners'

associations formed an interest group and intervened in the litigation in the district court. (Petition Appx., at 40a, 73a & n.10.)

Local opposition to the Wal-Mart store resulted in two distinct official acts. One, Petitioner Township Board of Trustees issued "Instructions" – instead of following the mandatory democratic process for enacting zoning regulations – that imposed an absolute 500,000 square-foot limit on the amount of total commercial development in the area where the store would have been located. Two, Petitioner Township Zoning Inspector and the Board of Zoning Appeals denied Respondent's application for a zoning permit to build the Wal-Mart store.

These two official acts resulted in two distinct litigations: (1) this federal lawsuit, which primarily challenges the 500,000 square-foot limit, and (2) a state-law administrative appeal, which challenged the denial of Respondent's application for the building permit. Although there is some analytical overlap, the state and federal litigations considered different official acts by the Petitioners and sought different remedies. The Sixth Circuit's description is helpful: "[a]lthough each proceeding requires an interpretation of the [zoning requirements], the harm alleged and the relief sought are distinct." (Petition Appx., at 14a.) The federal court ruling that Petitioners ask this Court to review concerns only the "claim that [Petitioners] violated [Respondent's] procedural due process rights by enacting the [500,000 square-foot

limit on commercial development] without notice and a public hearing." (*Id.*)

Throughout their brief, Petitioners conflate the state court proceedings and the federal proceedings. The opening line of Petitioners' Statement of the Case and Facts characterizes their request for a writ of certiorari as "arising out of" the decision to "deny zoning approval" of Respondent's application to build the Wal-Mart store. (Petition, at 2.) That is an accurate description of the now-terminated state-court litigation, but it is not an accurate description of this federal litigation. When the Sixth Circuit rejected Petitioners' argument that the due process claim was mooted by Wal-Mart's decision to abandon plans for constructing the store – after years of delay at the hands of Petitioners – it held that "the evaporation of Wal-Mart's offer to purchase [the property] does not extinguish [Respondent's] legally cognizable interest in securing a judgment that enforces its right to develop its property according to the . . . zoning as it existed" before Petitioners imposed their illegal limit on commercial development. (Petition Appx., at 13a.)

Petitioners' description of the case blurs this critical distinction. The state proceedings, in which Respondent appealed the denial of its application for a building permit, are over; the state courts determined that Respondents' appeal became moot when Wal-Mart decided to abandon the project. (Petition Appx., at 222a, 234a.) The state courts never faced the question raised in these federal proceedings: whether Petitioners violated Respondent's federal

constitutional rights by illegally adopting the absolute 500,000 square-foot limit on commercial development. The District Court's injunction, affirmed by the Sixth Circuit, does not affect the state courts' rulings on Respondent's application for a building permit; it prohibits Petitioners from enforcing the illegal 500,000 square-foot limit on commercial development. The district court issued the injunction after concluding that the limit violated Respondent's procedural due process rights, violated state law, and was void for vagueness. (Petition Appx., at 58a, 61a.)

The Sixth Circuit affirmed the injunction on an interlocutory appeal. It found that Petitioners could not enforce the 500,000 square-foot limit without giving the affected landowners proper notice and an opportunity to be heard. (Petition Appx., at 27a-28a.) It then rejected Petitioners' request for en banc rehearing, with no judge requesting an en banc vote. (Petition Appx., at 135a-136a.)

ARGUMENT

A. Introduction

Petitioners have not met the requirement of Supreme Court Rule 10 that there must be compelling reasons for the Court to issue a writ of certiorari. The two questions they offer for review would not be dispositive even of this litigation. In the order appealed from, the District Court granted an injunction after finding that Petitioners' illegal imposition of

new zoning "regulations" violated procedural due process, the void-for-vagueness prohibition, and state law, but their Petition for Writ of Certiorari challenges only the procedural due process ground. Moreover, Petitioners candidly admit that their challenge to the procedural due process ruling turns on a question of state law regarding Respondent's property interests. In other words, Petitioners want this Court to answer a question about Ohio property law in a ruling that will have no effect on the order they are attempting to appeal.

Petitioners offer two reasons for the Court to exercise its jurisdiction. *First*, they claim that the Sixth Circuit Court of Appeals transformed itself into "a zoning board of appeals" and "create[d] a federal law of zoning." (Petition, at i.) Their argument confuses this *federal court litigation*, in which Respondent alleged, *inter alia*, that Petitioners violated its procedural due process rights by illegally imposing new zoning regulations, with the earlier *state court litigation*, in which Respondent appealed from Petitioners' denial of its application for a zoning certificate to build a Wal-Mart store.

The Court of Appeals did not create "a federal law of zoning" in this case. It applied state property law to determine the extent of Respondent's property interests, and then applied federal constitutional law to determine whether those property interests are protected by the federal Due Process Clause. This is the analytic framework that was adopted in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and later

reaffirmed in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). It is not a "federal law of zoning," although local officials' zoning regulations – like all their official acts – must comply with federal due process guarantees. Petitioners' real argument is that the Court of Appeals misinterpreted Ohio state law that defines the scope of Respondent's property interests. That issue does not warrant this Court's review.

Second, Petitioners claim that a writ of certiorari should issue in this case because the Court of Appeals misinterpreted the abstention doctrine "solely to effectuate its federal law of zoning." (Petition, at i.) However, they never explain or support that accusation, and there is no evidence that the appellate panel had any ulterior motives. In any event, its decision explains that it did not review the abstention ruling in this interlocutory appeal from the District Court's injunction order because the abstention ruling was made in the District Court's separate order on Petitioners' motion to dismiss, which has not yet been appealed. (Opinion and Order, 456 F.Supp.2d at 927-930.)

There are no compelling reasons for this Court to expend its time and resources on either of the two questions that Petitioners have presented for review. The District Court and Court of Appeals followed exactly the same due process and abstention legal principles that the other circuits follow, consistent with previous rulings by this Court. Petitioners' request for a writ of certiorari should be denied.

B. There are no compelling reasons for this Court to review the Court of Appeals' ruling on Respondent's procedural due process claim.

1. The United States Court of Appeals for the Sixth Circuit is not attempting to create "a federal zoning board of appeals."

Petitioners argue that this Court's review is necessary because "[t]he Sixth Circuit . . . [is] acting as a federal zoning board of appeals, under which landowners will obtain results more favorable than those they could have obtained in state court." (Petition, at 9.) Their argument confuses the federal court proceedings in this case, in which both lower courts found that Petitioners' illegal adoption of new zoning regulations violated, *inter alia*, Respondent's procedural due process rights, with the former state court proceedings, in which Respondent appealed from Petitioners' decision to deny its application for a building permit.

When Petitioner Zoning Inspector denied its application (Petition Appx. G), Respondent appealed to the Township Board of Zoning Appeals, which affirmed the Zoning Inspector's decision. (Petition Appx. H.) Respondent appealed that ruling to the Court of Common Pleas of Delaware County, Ohio, which found no clear legal basis for denying Respondent's application and remanded the case for further proceedings. (Petition Appx. I.) On remand, the Board of Zoning Appeals again upheld Petitioner Zoning

Inspector's denial of Respondent's application. (Petition Appx. J.) Respondent appealed to the Court of Common Pleas for a second time, but it held that the appeal had become moot because Respondent's option contract to sell the property to Wal-Mart had expired during the years of litigation between the parties. (Petition Appx. K.) The Ohio Court of Appeals affirmed that ruling (Petition Appx. L), and the Supreme Court of Ohio denied discretionary review. (Petition Appx. M.)

In short, Respondent appealed Petitioners' denial of its application for a building permit through the Ohio *state court* system, which they acknowledge was the proper forum. Respondent pursued its claim that the illegal adoption of the new zoning "regulation" violated its procedural due process rights through the *federal courts*. The Sixth Circuit specifically pointed out in its decision that this is the "key distinction between Wedgewood's federal and state litigation. *Wedgewood's state court proceedings challenge the zoning inspector's denial of its application for a zoning certificate. . . .* In contrast, *Wedgewood's federal litigation involves its claim that [Petitioners] violated its procedural due process rights by enacting the Instructions*" that imposed the limit on commercial development. (Petition Appx., at 14a; emphasis added.) "[T]he harm alleged and the relief sought [in the state and federal proceedings] are distinct." (*Id.*)

The Court of Appeals did not act as "a zoning board of appeals." Respondent's appeal from the denial of its application for a building permit was

adjudicated in the state courts. The Court of Appeals acted within its authority when it affirmed the District Court's ruling that Petitioners violated Respondent's federal due process rights by enacting the illegal limit on commercial development.

2. The United States Court of Appeals for the Sixth Circuit has not created a "federal law of zoning."

Petitioners also claim that review by this Court is necessary because the Court of Appeals purportedly created a "federal law of zoning." (Petition, at 9.) As explained below, the Court of Appeals properly applied Ohio state property law to define Respondent's underlying property interests, and then properly applied federal constitutional law to determine whether those property interests are protected by the federal Due Process Clause.

In order to establish a procedural due process claim, a plaintiff "must establish three elements: (1) that [plaintiff] has a life, liberty or property interest protected by the Due Process Clause; (2) that [plaintiff] was deprived of this protected interest within the meaning of the Due Process Clause; and (3) that the state did not afford adequate procedural rights prior to depriving [plaintiff] of the protected interest." *Chandler v. Village of Chagrin Falls*, 296 Fed. Appx. 463, 469 (6th Cir. 2008).

Petitioners do not contest Respondent's proof of the second and third elements: it is no longer disputed that Respondent was deprived of its existing

zoning classification (and corresponding right to use its property for a Wal-Mart store) when Petitioners announced a new zoning "regulation," without any notice or opportunity to be heard, that imposed new restrictions prohibiting that use of the land. Petitioners challenge the ruling below only with respect to the first element: they claim that Respondent had no protected property interest in the uses of its land that were permitted by the existing zoning classification, and that it therefore has no remedy for Petitioners' illegal attempt to deprive it of those uses.

The Sixth Circuit Court of Appeals properly followed this Court's previous rulings when it found that Respondent had a protected property interest under Ohio law in the existing zoning classification. This Court described the attributes of property interests in *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is the purpose of a constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

408 U.S. at 577. The *Roth* Court explained that property interests – *i.e.,* legitimate expectations or entitlements – are created by state laws and other non-federal rules and understandings that affect property rights:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577. *See Town of Castle Rock v. Gonzales,* 545 U.S. 748, 756 (2005), *quoting Roth.* In the present case, Respondent had a justifiable expectation under Ohio law that it could use its land in the ways that were permitted by the existing zoning regulations unless new regulations were lawfully enacted.

State law defines the property interests that landowners justifiably expect to enjoy, but federal constitutional law necessarily determines whether the extent of the owners' entitlement to those property interests warrants protection under the federal Due Process Clause. *See Castle Rock, supra,* 545 U.S. at 756-57:

> We will not, of course, defer . . . on the ultimate issue: whether what Colorado law has given respondent constitutes a property interest for purposes of the Fourteenth Amendment [Due Process Clause]. *That*

> *determination, despite its state-law underpinnings, is ultimately one of federal constitutional law.*

(Emphasis added.) *See also Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 9 (1978) ("[a]lthough the underlying substantive [property] interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause") (*quoting Roth, supra,* 408 U.S. at 577). This analytic framework does not create a "federal law of zoning."

The Sixth Circuit Court of Appeals has consistently followed this precedent. *See, e.g., Chandler, supra,* 296 Fed. Appx. at 469 (applying Ohio state law to determine the requisite "property interest," and then applying federal law to determine whether that property interest is "constitutionally protected" by the Due Process Clause) (*citing Roth*, *supra*, and *Castle Rock*, *supra*); *Mater v. City of Ecorse,* 301 Fed. Appx. 476, 479 (6th Cir. 2008) (using Michigan state law to define the property interests at issue and federal law to determine whether those property interests are "protected by . . . due process").

In the present case, the District Court recognized that "[p]roperty rights 'are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law,'" *quoting Roth.* (Petition Appx., at 121a-122a.) It also

recognized that "[p]roperty interests protected by the due process clause must be more than abstract desires or attractions to a benefit. [*Citing Roth.*] The due process clause protects only those interests to which one has a 'legitimate claim of entitlement.' [*Quoting Roth.*]" (*Id.*, at 122a.) The District Court then used state law to determine the scope of Respondent's property interest and federal law to determine that this property interest is protected by due process guarantees.

The Court of Appeals also relied on *Roth, supra,* when it affirmed that ruling. "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law," and "a party obtains a protected property right under the Fourteenth Amendment when it can demonstrate a 'legitimate claim of entitlement' or a 'justifiable expectation'. . . ." (Opinion, at 21a.) It concluded, "consistent with *Roth*," that:

> Wedgewood had a "justifiable expectation" that its zoning classification – its right to develop up to 220,857 square feet of commercial space on [its land] – was vested unless or until [Petitioners] passed an amendment to the [zoning plan] comporting with the notice and hearing requirements set forth in Ohio Rev. Code §519.12 * * * [W]e hold that the Instructions . . . unlawfully amended [the

> existing zoning plan] . . . in violation of the Due Process Clause and Ohio Rev. Code §519.12.

Id., at 25a, 27a.)

The Sixth Circuit did not create a "federal law of zoning" in its ruling below. It applied well-settled federal due process law after it determined "whether [Respondent] established a vested property interest" under "substantive state zoning laws." (*Id.*, at 21a.) The Court of Appeals expressly addressed Petitioners' argument that Respondent had no property interest under Ohio law unless it applied for a building permit before Petitioners announced the new illegal zoning regulations, and it properly rejected that argument because Respondent does not claim a property interest in a building permit. (*Id.*)

Petitioners rely upon *Gibson v. Oberlin*, 171 Ohio St. 1 (1960), and *Zaremba Development Co. v. Fairview Park*, 84 Ohio App.3d 174 (1992), to support their contention that a landowner has no property interest in the potential uses of the land that are permitted by existing zoning regulations unless and until it applies for a building permit. The landowners in those cases were not challenging illegal zoning regulations; they claimed they had a property interest in building permits that the defendants had refused to grant. Respondent's claim for a building permit was adjudicated in the state courts and is *not* at issue in the present case. Respondent asserts a property interest in the uses of its property that are

allowed by the existing, valid zoning classification, which has not been legally amended and therefore remains in effect.

Ohio law has always recognized that landowners have a property interest in the use of their lands. "The rights related to property, *i.e.*, to acquire, use, enjoy, and dispose of property . . . are among the most revered in our law and traditions." *City of Norwood v. Horney*, 110 Ohio St.3d 353, 362 (2006). In *City of Akron v. Chapman*, 160 Ohio St. 382, 388 (1953), the Supreme Court of Ohio held that a landowner had a property interest in continuing to use its property in ways that were prohibited by new zoning regulations even though it had never applied for a building permit:

> What is property? It has been defined as not merely the ownership and possession of lands or chattels but the unrestricted right of their use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. . . .
>
> The right to continue to use one's property in a [way] . . . which was lawful at the time it was acquired is within the protection of Section 1, Article XIV, Amendments, Constitution of the United States, and Section 16, Article I of the Ohio Constitution, which provide that no person shall be deprived of life, liberty or property without due process of law.

In *Union Oil Co. v. City of Worthington*, 62 Ohio St.2d 263 (1980), the Court held that a property owner could bring a declaratory judgment action to challenge the constitutionality of zoning legislation that "proscribe[d] the property owner's proposed use of the property"; the declaratory judgment was entered *before* the landowner applied for a building permit. 62 Ohio St.2d at 265. *See also Superior Hauling, Inc. v. Allen Township Zoning Board of Appeals*, 172 Ohio App.3d 313, 317 (2007):

> A township [zoning] regulation or rule that exceeds statutory limits is invalid and unenforceable. . . . Thus, when R.C. 519.211 expressly denied the township's authority to zone the use of public-utility properties, any township zoning ordinance that attempted to do so was a nullity. . . . *For a zoning provision to be enforceable, it must . . . be properly enacted by the township.*

(Emphasis added.) Although the landowner applied for a variance *after* the zoning regulations were enacted, the Court found in *Superior Hauling* that he had a right to "challenge the authority of the appellees to regulate" the property. 172 Ohio App.3d at 318. *See also Robert Weiler Co. v. Kingston Township, Ohio*, No. 2:07-cv-760, 2009 WL 890538 (S.D. Ohio 2009), in which the Court held that a landowner could properly assert a procedural due process claim even though the defendant township had imposed a moratorium that prevented him from applying for a

zoning permit until after it had amended its zoning regulations to prohibit the proposed use.

Petitioners contend that Respondent cannot have a property interest in their compliance with the Ohio statutory requirements for adopting zoning regulations, which in this case required notice and a hearing. *But Respondent does not claim a property interest in these statutory procedures,* and the Court of Appeals did not address that issue. It found that Respondent had a property interest in "*its zoning classification – its right to develop commercial space on subarea 3, which was vested unless and until the Commission and Trustees passed [a lawful] amendment" to the zoning regulations.* (Petition Appx., at 25a; emphasis added).

The Court of Appeals did not err when it rejected Petitioners' argument that "[b]ecause Wedgewood submitted its application post-Instructions . . . [it] cannot demonstrate a vested property interest in its zoning classification." (Petition Appx., at 23a.) Respondent's property interest in the uses of its land that were permitted by the existing regulations necessarily continued to exist unless and until those regulations were lawfully amended. *See, e.g., Robert Weiler Co., supra,* (finding a "procedural due process injury" where the defendant township did not "evaluate the application under the zoning resolution in effect at that time, as required by Ohio law"); *Stile v. Copley Township,* 115 F.Supp.2d 854, 865, fn. 21 (N.D. Ohio 2000) (finding that a landowner's property interest in the uses of the land that were permitted

by zoning regulations had vested, for due process purposes, even though he did not file a valid application for a zoning permit prior to the defendant's unlawful amendment of the regulations).

The Court of Appeals properly concluded that Respondent had a "justifiable expectation" that it would be able to exercise its right under the existing regulations to build a Wal-Mart store on its property, and thus had "a protected property right under the Fourteenth Amendment," unless and until Petitioners adopted valid regulations that prohibited it. (Petition Appx., at 24a-25a.) Petitioners argue at length that Respondent could not have a justifiable expectation that it would obtain a building permit because there are no substantive limits on their discretion to approve or deny its application. But the Court of Appeals did *not* find that Respondent had a protected property interest in the building permit; it found that Respondent had a property interest in the uses of its land that were allowed by the existing zoning classification, and *Petitioners did not have discretion to arbitrarily and illegally announce new restrictions.*

Finally, a writ of certiorari would be particularly inappropriate in this case because the lower courts also found that Petitioners' 500,000 square-foot limit on commercial development violated Ohio Rev. Code §519.12. This conclusion, standing alone, would support the injunction that was entered against Petitioners in this case. Moreover, the Court of Appeals did not reach another alternative ground for the

District Court's injunction order; the new zoning restriction that Petitioners tried to impose is also void because it is unconstitutionally vague. In any event, the Sixth Circuit has not created a "federal law of zoning," and there are no compelling reasons for this Court to review its decision.

C. There are no compelling reasons for this Court to review the Court of Appeals' ruling on abstention.

Petitioners also challenge the Sixth Circuit's decision to decline pendent appellate jurisdiction over the District Court's decision denying Petitioners' abstention claims. (Petition, at 29-33.) But the question they present under Supreme Court Rule 14.1(a) is whether the Sixth Circuit "can interpret the abstention doctrine" as it did. (Petition, at i.) This question was not addressed in the Sixth Circuit's opinion, which did not "interpret" any of the abstention doctrines. Instead, the Sixth Circuit decided that it had no appellate jurisdiction to consider the District Court's ruling on abstention. (Petition Appx., at 12a-13a.) Tellingly, Petitioners do not identify the abstention doctrine that the Sixth Circuit purportedly interpreted, and they do not explain how the Sixth Circuit misinterpreted it.

This Court does "not decide in the first instance issues not decided below," even if they were briefed in the Court of Appeals. *See, e.g.*, *NCAA v. Smith*, 525

U.S. 459, 470 (1999). Nor does it consider issues discussed "in the text of [a] petition for certiorari" if they are not "fairly included in the question presented for our review" under Rule 14.1(a). *Wood v. Allen*, ___ U.S. ___, 130 S. Ct. 841, 851 (2010) The Sixth Circuit did not decide any question about abstention. Petitioners do not ask this Court to consider the issue that the Sixth Circuit did decide: that it lacked appellate jurisdiction over the abstention ruling in this interlocutory appeal.

Regardless, Petitioners do not satisfy Supreme Court Rule 10 as to either abstention or the pendent jurisdiction issues. They do not even claim that the decisions below on these issues conflict with decisions of this Court or of the other circuit courts. Petitioners' sole argument is that the Sixth Circuit "ignored" its own Sixth Circuit precedent. (Petition, at 30.) That is not a compelling reason to issue a writ of certiorari.

CONCLUSION

For the reasons set forth above, Respondent asks the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

ROBERT E. TAIT (0020884)
Counsel of Record
BRUCE L. INGRAM
VORYS, SATER, SEYMOUR
AND PEASE, LLP
52 East Gay Street
Columbus, Ohio 43215
Tel: (614) 464-6341
Fax: (614) 719-4994
retait@vorys.com

Attorneys for Respondent